

August 3, 2017

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
POWERTECH USA, INC. ) Docket No. 40-9075-MLA  
 )  
(Dewey-Burdock )  
In Situ Uranium Recovery Facility) )

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF  
CONTENTIONS 1A AND 1B

INTRODUCTION

In accordance with 10 C.F.R. § 2.1205, the Atomic Safety and Licensing Board's Partial Initial Decision dated April 30, 2015,<sup>1</sup> and the Commission's Memorandum and Order dated December 23, 2016,<sup>2</sup> the Nuclear Regulatory Commission (NRC) Staff moves for summary disposition on Contentions 1A and 1B.<sup>3</sup> In Contention 1A, the Board found that, when considering how the Dewey-Burdock Project may affect cultural resources, the Staff failed to meet the "hard look" standard of the National Environmental Policy Act<sup>4</sup> (NEPA).<sup>5</sup> In Contention 1B, the Board found that the Staff failed to satisfy the consultation requirements of the National

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<sup>1</sup> *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618 (2015).

<sup>2</sup> *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219 (2016).

<sup>3</sup> In accordance with the Board's Order dated October 4, 2010, counsel for the Staff contacted counsel for the other parties to obtain their views on this Motion and to provide the Staff's material facts about which the Staff believes there is no genuine dispute. See Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Oct. 4, 2010) (Agencywide Documents Access and Management System (ADAMS)) Accession No. 102770545) at 10. Counsel for Powertech stated that they support the Motion. Counsel for the Oglala Sioux Tribe and counsel for the Consolidated Intervenors stated that they intend to oppose the motion.

<sup>4</sup> 42 U.S.C. § 4321 et seq.

<sup>5</sup> *Powertech*, LBP-15-16, 81 NRC at 653-57.

Historic Preservation Act<sup>6</sup> (NHPA).<sup>7</sup> The Board directed the Staff to file a monthly report to the Board on its progress in addressing the outstanding issues in Contentions 1A and 1B. The Board directed that the Staff's final monthly report "shall demonstrate that the [Final Supplemental Environmental Impact Statement (FSEIS)] complies with NEPA and with 10 C.F.R. Part 40 and include an agreement reflecting the parties' settlement of their dispute regarding the contentions or a motion for summary disposition of Contentions 1A and 1B."<sup>8</sup>

On August 3, 2017, in conjunction with this Motion, the Staff filed its final monthly report informing the Board and the parties that the Staff and the Oglala Sioux Tribe have not arrived at a settlement of the outstanding issues in Contentions 1A and 1B. The final monthly report demonstrates that the FSEIS complies with NEPA and with 10 C.F.R. Part 40.<sup>9</sup> As more fully set forth below, there is no genuine issue as to any material fact with respect to the outstanding issues identified by the Board concerning Contentions 1A and 1B. Further, the material facts demonstrate that the Staff has fulfilled its remaining responsibilities under NEPA and the NHPA with respect to Contentions 1A and 1B. Accordingly, the Board should find that the Staff is entitled to judgment as a matter of law, resolve the outstanding issues in Contentions 1A and 1B in favor of the Staff, and terminate this proceeding.<sup>10</sup>

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<sup>6</sup> 54 U.S.C. § 300101 et seq.

<sup>7</sup> *Powertech*, LBP-15-16, 81 NRC at 657-58.

<sup>8</sup> *Id.* at 710.

<sup>9</sup> See *supra* note 8.

<sup>10</sup> 10 C.F.R. § 2.1205(a) states that "motions for summary disposition may be submitted to the presiding officer by any party no later than 45 days before the commencement of hearing" and "must include a written explanation of the basis of the motion." Additionally, 10 C.F.R. § 2.323(a) specifies that motions must be filed no later than ten (10) days after the occurrence or circumstance from which the motion arises. This Motion is timely filed pursuant to 10 C.F.R. § 2.1205(a) and 10 C.F.R. § 2.323(a). The evidentiary hearing for Contentions 1A and 1B took place on August 19-21, 2014, and the Board's Partial Initial Decision ruling on the contentions admitted for hearing specified that a motion for summary disposition may accompany the Staff's final status report. *Powertech*, LBP-15-16, 81 NRC at 710. As the Staff has not reached a settlement with the Oglala Sioux Tribe to resolve the outstanding matters in Contentions 1A and 1B, the Staff submits this motion for summary disposition in accordance with the Board's ruling. Furthermore, this Motion has been filed within 10 days of the Staff's issuance of a letter to the Oglala Sioux Tribe conveying the Staff's position that further consultation with the Tribe is unlikely to result in a mutually acceptable settlement of the dispute regarding the outstanding contentions. See *infra* note 167.

## PROCEDURAL HISTORY

### I. Contentions 1A and 1B

Contention 1A, as admitted and migrated by the Board, asserted that the FSEIS “fail[ed] to meet applicable legal requirements regarding protection of historical and cultural resources.”<sup>11</sup> Specifically, the intervenors<sup>12</sup> alleged that while 10 C.F.R. §§51.71(d), 51.45(b) and NEPA require the FSEIS to include an analysis of cultural impacts, “neither [the applicant nor the NRC Staff] has conducted an adequate and competent cultural resources survey, impacts analysis, or mitigation review.”<sup>13</sup> Contention 1B, as admitted and migrated by the Board, asserted that the Staff “failed to involve or consult all interested Tribes as required by federal law.”<sup>14</sup> The Oglala Sioux Tribe argued that the Staff failed to comply with the NHPA requirement to consult with “Indian Tribe[s] . . . that attach[ ] religious and cultural significance” to historic properties potentially affected by the Dewey-Burdock project and that the Staff failed to engage in government-to-government consultation “in a manner sensitive to the concerns and needs” of the Oglala Sioux Tribe.<sup>15</sup>

### II. The Board’s Ruling on Contentions 1A and 1B

On April 30, 2015, the Board issued its Partial Initial Decision on the admitted contentions. The Board resolved Contentions 1A and 1B in favor of the intervenors<sup>16</sup> and the remaining contentions in favor of the Staff and the licensee, Powertech (USA), Inc. (Powertech).<sup>17</sup>

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<sup>11</sup> *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-14-5, 79 NRC 377, 385, 401 (2014).

<sup>12</sup> Contention 1A was proffered by the Oglala Sioux Tribe and the Consolidated Intervenors. Contention 1B was proffered by the Oglala Sioux Tribe.

<sup>13</sup> *Powertech*, LBP-15-16, 79 NRC at 650 (quoting Oglala Sioux Tribe Post-Hearing Initial Brief at 13) (internal quotations omitted).

<sup>14</sup> *Powertech*, LBP-14-5, 79 NRC at 387, 401.

<sup>15</sup> *Powertech*, LBP-15-16, 79 NRC at 651.

<sup>16</sup> *Id.* at 653-57.

<sup>17</sup> *Id.* at 708-10.

In resolving Contention 1A, the Board found that, when considering how the Dewey-Burdock project may affect cultural resources, the Staff failed to meet the “hard look” standard of NEPA.<sup>18</sup> The Board did find that the Staff complied with the NHPA requirement to make a good faith and reasonable effort to identify properties eligible for inclusion in the National Register of Historic Places.<sup>19</sup> But the Board found that the information required to analyze impacts to sites of cultural, historic, or religious significance to the Oglala Sioux Tribe under NEPA is broader than that required under the NHPA and is obtainable only from the Tribe itself.<sup>20</sup> Based on its finding that the tribal surveys of the Powertech site “did not contain any tribal ethnographic studies, oral histories or a survey of sites of significance to . . . the Oglala Sioux Tribe,” the Board concluded that the FSEIS was deficient under NEPA.<sup>21</sup>

In resolving Contention 1B, the Board found that the Staff failed to satisfy the consultation requirements of the NHPA, noting that the consultation process “broke down” as evidenced by the failure to agree on “the scope, techniques, or timing of the field surveys [or] alternatives to a field survey . . . .”<sup>22</sup> The Board found that the Oglala Sioux Tribe “does share some responsibility for the inadequacy of the FSEIS and the lack of meaningful consultation,” and that “some of its demands to engage with the NRC Staff were patently unreasonable.”<sup>23</sup> But the Board noted that “[e]ven after a thorough review of the record in this case, the Board is not able to decide definitively which party or specific actions led to the impasse preventing an adequate tribal cultural survey” and found the Staff “at least partly at fault for the failed consultation process.”<sup>24</sup> Specifically, the Board found that the Staff did not hold a single government-to-government consultation session solely with the Oglala Sioux Tribe to resolve its

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<sup>18</sup> *Id.* at 657.

<sup>19</sup> *Id.* at 654.

<sup>20</sup> *Id.* at 654-55.

<sup>21</sup> *Id.* at 655.

<sup>22</sup> *Id.* at 656.

<sup>23</sup> *Id.* at 655.

<sup>24</sup> *Id.* at 656.

concerns.<sup>25</sup> The Board found that neither the three meetings between the Staff and several tribes nor the “numerous letters . . . sent to the Oglala Sioux Tribe necessarily constituted meaningful or reasonable consultation under the NHPA.”<sup>26</sup>

Given its finding that the Oglala Sioux Tribe bore some responsibility for the insufficient consultation and did not participate in the April 2013 cultural resources site survey, the Board declined to immediately suspend the license.<sup>27</sup> The Board ruled that the Staff could remedy the deficiencies identified by the Board “by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe which may be impacted by the Powertech Dewey-Burdock project, and to adopt measures to mitigate such adverse effects, if necessary,”<sup>28</sup> and retained jurisdiction of the case pending the Staff’s curing of these deficiencies.<sup>29</sup> The Board further ordered the Staff to file monthly status reports describing its efforts to remedy the deficiencies, with the final report “includ[ing] an agreement reflecting the parties’ settlement of their dispute regarding the contentions or a motion for summary disposition of Contentions 1A and 1B.”<sup>30</sup>

### III. The Commission’s Resolution of Petitions for Review of the Board’s Ruling on Contentions 1A and 1B

On May 26, 2015, each party submitted a petition for review to the Commission.<sup>31</sup> The Oglala Sioux Tribe and the Consolidated Intervenors challenged the Board’s decision not to

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<sup>25</sup> *Id.* at 651.

<sup>26</sup> *Id.* at 656.

<sup>27</sup> *Id.* at 658.

<sup>28</sup> *Id.* at 657.

<sup>29</sup> *Id.* at 658.

<sup>30</sup> *Id.* at 710.

<sup>31</sup> Oglala Sioux Tribe’s Petition for Review of LBP-15-16 and Decisions Finding Tribal Contentions Inadmissible (May 26, 2015) (ADAMS Accession No. ML15146A500) [hereinafter Oglala Sioux Tribe’s Petition]; Consolidated Intervenors’ Petition for Review of LBP-15-16 (May 26, 2015) (ADAMS Accession No. ML15147A069) [hereinafter Consolidated Intervenors’ Petition]; Brief of Powertech (USA), Inc. Petition for Review of LBP-15-16 (May 26, 2015) (ADAMS Accession No. ML15146A495) [hereinafter Powertech’s Petition]; NRC Staff’s Petition for Review of LBP-15-16 (May 26, 2015) (ADAMS Accession No. ML15146A499) [hereinafter Staff’s Petition].

admit certain contentions, the Board's resolution of several admitted contentions in favor of the Staff and Powertech, and the Board's decision to leave the license in place despite finding in favor of the Oglala Sioux Tribe and Consolidated Intervenors on Contentions 1A and 1B.<sup>32</sup> The Staff and Powertech petitioned for review of the Board's resolution of Contentions 1A and 1B in favor of the intervenors, as well as the Board's decision to retain jurisdiction over these contentions. Powertech further petitioned for review of the Board's imposition of a license condition regarding the location and abandonment of unplugged boreholes.<sup>33</sup>

On December 23, 2016, the Commission issued CLI-16-20, taking review of these petitions in part.<sup>34</sup> The Commission granted each party's petition with respect to the finality of the Board's ruling on Contentions 1A and 1B, finding that the contentions should be considered "final" for the purposes of the Commission's review of the Board's Partial Initial Decision.<sup>35</sup> However, the Commission denied each party's petition for review of the Board's ruling on Contentions 1A and 1B.<sup>36</sup> The Commission left in place the Board's ruling in favor of the intervenors on both contentions and, pursuant to its inherent supervisory authority over agency adjudications, left the proceeding open "for the narrow issue of resolving the deficiencies identified by the Board."<sup>37</sup> The Commission declined to take review of the aspects of the parties' petitions unrelated to Contentions 1A and 1B, with the exception of the Oglala Sioux Tribe's challenge of the Board's decision not to admit a contention regarding the scoping process, which the Commission affirmed.<sup>38</sup>

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<sup>32</sup> See generally Oglala Sioux Tribe's Petition and Consolidated Intervenors' Petition.

<sup>33</sup> See generally Staff's Petition and Powertech's Petition.

<sup>34</sup> *Powertech*, CLI-16-20, 84 NRC 219.

<sup>35</sup> *Id.* at 222, 262.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 222, 242; see also *id.* at 262. The Commission also affirmed the Board's direction to the Staff to submit monthly status reports and the Board's direction to file an agreement between the parties or a motion for summary disposition to resolve the deficiencies identified by the Board. *Id.* at 222, 251, 262.

<sup>38</sup> *Id.* at 222, 262.

## LEGAL STANDARDS

### I. Legal Standards Governing Motions for Summary Disposition

Summary disposition may be granted where the relevant documents demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.<sup>39</sup> The moving party carries the initial burden of demonstrating that summary disposition is appropriate, and must explain in writing the basis for the motion.<sup>40</sup> To support its motion, the moving party must also “attach a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard.” Where such facts are properly presented and are not controverted, they are deemed to be admitted.<sup>41</sup>

10 C.F.R. § 2.1205(c) states, “[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part.” Subpart G, Section 2.710(d)(2), provides, “[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” Once the moving party makes a proper showing for summary disposition, “if the party opposing the motion does not show that a genuine issue of material fact exists, the Board may summarily dispose of all arguments on the basis of the pleadings.”<sup>42</sup>

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<sup>39</sup> *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 297, 298 (2010); *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993), *reconsid. denied*, CLI-93-24, 38 NRC 187 (1993).

<sup>40</sup> *See, e.g., Advanced Med. Sys., Inc.*, CLI-93-22, 38 NRC at 102 (1993); 10 C.F.R. § 2.1205(a). This proceeding is being conducted under the procedures in Subpart L of 10 C.F.R. Part 2.

<sup>41</sup> *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 520 (1982).

<sup>42</sup> *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC at 102.

II. Legal Standards Applicable to the Identification of Adverse Effects to Sites of Traditional Religious and Cultural Importance to the Oglala Sioux Tribe

A. The National Historic Preservation Act

Congress enacted the NHPA in 1966 to “foster conditions under which our modern society and our historic property can exist in productive harmony.”<sup>43</sup> In furtherance of this purpose, Section 106 of the NHPA requires a Federal agency to “take into account the effect of [any] undertaking on any historic property,”<sup>44</sup> including properties of cultural or religious significance to Indian tribes.<sup>45</sup> In order to accomplish this, Federal agencies “must engage in consultation with parties such as the [State Historic Preservation Officer] and any potentially affected Indian tribes (‘Section 106 consultation’) to determine whether historic properties or traditional cultural properties (‘TCPs’) exist in the area of the planned activity.”<sup>46</sup> The Federal agency must also provide the Advisory Council on Historic Protection (ACHP) a reasonable opportunity to comment on the undertaking.<sup>47</sup> Section 106, like NEPA, is a “stop, look, and listen” provision that requires each federal agency to consider the effects of the projects it licenses on historic properties;<sup>48</sup> it does not mandate that the Federal agency take any particular measures to protect these properties.<sup>49</sup>

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<sup>43</sup> 54 U.S.C. § 300101(1).

<sup>44</sup> 54 U.S.C. § 306108.

<sup>45</sup> *Id.* §§ 306108, 302706(b). An undertaking is defined in the NHPA as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license, or approval[.]” *Id.* § 300320.

<sup>46</sup> *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 459 F. Supp. 2d 1102, 1123 (D.N.M. 2006), *aff’d in part, vacated in part, rev’d in part*, 565 F.3d 683 (10th Cir. 2009) (citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995)).

<sup>47</sup> 54 U.S.C. § 306108.

<sup>48</sup> See *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir.1999); *cf. United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir.1993) (“NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.”).

<sup>49</sup> See *CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105, 106-07 (D.C. Cir. 2006) (citing *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000)).

## 1. Overview of the Section 106 Process

The ACHP promulgates the regulations necessary to implement Section 106.<sup>50</sup> These regulations set forth the “Section 106 process” a Federal agency must follow to satisfy Section 106 of the NHPA.<sup>51</sup> Under them, a Federal agency must first initiate the Section 106 process by determining whether the Federal agency action in question is an “undertaking”<sup>52</sup> having the potential to cause effects on historic properties.<sup>53</sup> If this is the case, the agency must identify and initiate consultation with the appropriate State Historic Preservation Officer (SHPO).<sup>54</sup> The agency is also required at this stage to identify any other appropriate consulting parties, which includes the obligation to “make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.”<sup>55</sup>

After initiating the Section 106 process, a Federal agency’s responsibility to implement the process proceeds in phases. The agency must first make “a reasonable and good faith effort” to identify historic properties<sup>56</sup> within the area of potential effects that may be affected by the undertaking, and gather sufficient information to evaluate the eligibility of these properties for the National Register of Historic Places.<sup>57</sup> For each identified property, the agency official, in consultation with the SHPO, must evaluate the property against the National Register criteria to determine its eligibility for inclusion.<sup>58</sup> If one or more historic properties are identified and are determined to be eligible for the National Register, the agency must then assess whether the

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<sup>50</sup> See 54 U.S.C. § 304108(a). These regulations “command substantial judicial deference.” *McMillan Park Comm. v. Nat’l Capital Planning Comm’n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992).

<sup>51</sup> See 36 C.F.R. Part 800, Subpart B—The Section 106 Process.

<sup>52</sup> 36 C.F.R. § 800.1(c).

<sup>53</sup> *Id.* § 800.3(a).

<sup>54</sup> *Id.* § 800.3(c).

<sup>55</sup> *Id.* § 800.3(f)(2).

<sup>56</sup> *Id.* § 800.4(b)(1).

<sup>57</sup> 36 C.F.R. § 800.4(b); see also *Pueblo of Sandia*, 50 F.3d at 859.

<sup>58</sup> *Pueblo of Sandia*, 50 F.3d at 859 (citing 36 C.F.R. § 800.4(c)). These criteria are found in 36 C.F.R. § 60.4.

undertaking will have an adverse effect on the historic property.<sup>59</sup> If an adverse effect is found, the agency must then consult to resolve the adverse effect.<sup>60</sup> This process may result in a memorandum of agreement memorializing agreed-upon methods to avoid, minimize or mitigate the adverse effects to the historic property, or, if such an agreement cannot be reached, a decision to terminate consultation on the grounds that further consultation will not be productive.<sup>61</sup> Once this is done, the agency may move forward with decisionmaking.<sup>62</sup>

The Section 106 process must be completed “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.”<sup>63</sup> However, under certain circumstances, such as where an undertaking’s effects “cannot be fully determined prior to approval” of the project, an agency and the ACHP may instead “negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects[.]”<sup>64</sup> The Federal agency must consult with affected tribes during the negotiation of the programmatic agreement.<sup>65</sup> Once executed by the required signatories, the programmatic agreement binds the agency and “satisfies the agency’s section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency.”<sup>66</sup> In accordance with 36 C.F.R. §§ 800.4(b)(2) and 800.14(b), the Staff finalized a programmatic agreement for the Dewey-Burdock project before issuing the license.<sup>67</sup>

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<sup>59</sup> See generally 36 C.F.R. § 800.5.

<sup>60</sup> 36 C.F.R. § CFR 800.5(d)(2); see also generally 36 C.F.R. § 800.6.

<sup>61</sup> See 36 C.F.R. §§ 800.6 and 800.7 for the steps an agency must follow under each scenario.

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* § 800.1(c) (quotation marks omitted).

<sup>64</sup> *Id.* § 800.14(b). One such circumstance is where the agency or applicant has proposed a phased approach to developing a project, such as Powertech has proposed here. See *id.* § 800.4(b)(2).

<sup>65</sup> *Id.* § 800.14(b)(2)(i).

<sup>66</sup> *Id.* § 800.14(b)(2)(iii).

<sup>67</sup> Exhibits (Exs.) NRC-018-A through NRC-018-H. The Dewey-Burdock Programmatic Agreement documents the steps the NRC will take to protect currently identified historic properties and the approach to be used to protect properties potentially affected by future phases of the project. The signatories to the Programmatic Agreement include the NRC, Powertech, the ACHP, the South Dakota SHPO, and the Bureau of Land Management. The ACHP signed the Programmatic Agreement because “based on the background documentation, the issues addressed during consultation, and the processes established in the [Programmatic Agreement], [it] concluded that the content and spirit of the Section 106 process has been met by [the] NRC.” Ex. NRC-031, Letter from John Fowler, Executive Director, ACHP, to Waste’

2. Standards Concerning Identification of Sites of Traditional Religious and Cultural Importance to Tribes

As explained above, the first phase of the Section 106 process requires a Federal agency to make a reasonable and good faith effort to carry out appropriate efforts to identify historic properties that may be affected by an undertaking.<sup>68</sup> “Historic properties” are defined in the NHPA as properties that are listed on or eligible for listing on the National Register.<sup>69</sup> Historic properties may include those of “traditional religious and cultural importance to an Indian tribe[.]”<sup>70</sup> The identification of these properties is a necessary threshold step in the Section 106 process, as only properties that a Federal agency has identified can be evaluated by the agency for their eligibility for the National Register (and thus be considered “historic properties” for the purposes of the NHPA); for potential adverse impacts from the project; or for measures to avoid, minimize or mitigate any such adverse impacts.

The expertise in identifying properties of traditional religious or historical significance to a group, such as an Indian tribe, resides primarily, if not exclusively, with the knowledgeable parties within that group.<sup>71</sup> “[I]n some cases such properties may not be discernible as such to

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Win Young, Standing Rock Sioux Tribe Historic Preservation Officer (April 7, 2014) (ADAMS Accession No. ML14115A448). Further, the Staff’s record of consultation with tribes, including the Oglala Sioux Tribe, on the Programmatic Agreement – as required by 36 C.F.R. § 800.14(b)(2)(I) – is documented in its prior pleadings, testimony, and exhibits, herein incorporated by reference.

<sup>68</sup> 36 C.F.R. § 800.2(b)(1).

<sup>69</sup> “In this division, the term ‘historic property’ means any prehistoric or historic district, site, building, structure, or object *included on, or eligible for inclusion on, the National Register*, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” 54 U.S.C. § 300308 (emphasis added). The National Register of Historic Places, authorized by the NHPA, is the nation’s official list of historic places worthy of preservation and is maintained by the National Park Service, a division of the U.S. Department of the Interior.

<sup>70</sup> 54 U.S.C. § 302706(a). A property of “traditional religious and cultural importance” to a Tribe is not *necessarily* a “historic property”; it must also meet the eligibility criteria for listing on the National Register to be considered a historic property for the purposes of Section 106.

<sup>71</sup> Exs. NRC-145-A and NRC-145-B, U.S. Department of the Interior, National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties, 7-10 (1998) [hereinafter Bulletin 38]. In 1990, the National Park Service – which administers the National Register program – issued National Register Bulletin 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties,” as “an aid in determining whether properties thought or alleged to have traditional cultural significance are eligible for inclusion in the National Register,” giving “special attention to properties of traditional cultural significance to Native American groups, and to discussing the place of religion in the attribution of such significance.” *Id.* at 2, 3. Bulletin 38 provides the guidelines for identifying and evaluating traditional cultural properties, including properties that may be of traditional

anyone but a knowledgeable member of the group that ascribes significance to them; in such cases it may be impossible even to find the relevant properties, or locate them accurately, without the aid of such parties.”<sup>72</sup> In other words, the fundamental difference between properties of traditional religious or historical significance to a Tribe, and other kinds of historic properties, is that their significance cannot be determined solely by research, archaeological field investigation, and other professional tools; instead, the existence and significance of such sites must be determined by the community that values it.<sup>73</sup> To this end, the ACHP’s regulations require that the agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency’s undertaking<sup>74</sup> and “acknowledge that Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”<sup>75</sup>

### 3. Standards Concerning Section 106 Consultation with Tribes

A Federal agency’s duty to consult with parties that may be affected by an undertaking is an intrinsic part of every phase of the Section 106 process. As noted above, the requirement to consult with affected Indian tribes, in particular, is made explicit in the NHPA and throughout the ACHP’s regulations. The NHPA requires that, in carrying out the Section 106 process, a Federal agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency’s undertaking.<sup>76</sup> The ACHP’s regulations likewise reflect this requirement.<sup>77</sup> The regulations direct that a Federal

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religious and cultural significance to an Indian tribe. See, e.g., *Muckleshoot Indian Tribe*, 177 F.3d at 807 (“Bulletin 38 provides the recognized criteria for the Forest Service’s identification and assessment of places of cultural significance”).

<sup>72</sup> Bulletin 38 at 9.

<sup>73</sup> Patricia L. Parker, *Traditional Cultural Properties: What You Do and How We Think*, CRM, Vol. 16 (1993), at 4.

<sup>74</sup> 54 U.S.C. § 302706(b).

<sup>75</sup> 36 C.F.R. § 800.4(c)(1).

<sup>76</sup> 54 U.S.C. § 302706(b).

<sup>77</sup> “Section [302706(b)] of the act requires the agency official to consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe . . . shall be a consulting party.” 36 C.F.R. § 800.2(c)(2)(ii).

agency ensure that consultation provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties, including those located off tribal lands; to advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to it; to articulate its views on the undertaking's effects on such properties; and to participate in the resolution of adverse effects to such properties.<sup>78</sup>

The ACHP's regulations and guidance provide guidelines on the manner in which tribal consultation should be conducted, but do not provide specific direction to agencies on how to carry out their consultation responsibilities.<sup>79</sup> The ACHP's regulations state that consultation with Indian tribes should commence early in the planning process and be conducted in a sensitive manner respectful of tribal sovereignty.<sup>80</sup> Tribal consultation "must recognize the government-to-government relationship between the Federal Government and Indian tribes" and the agency must "consult with representatives designated or identified by the tribal government."<sup>81</sup> This consultation should be carried out "in a manner sensitive to the concerns and needs of the Indian tribe[.]"<sup>82</sup>

In 2000, President Clinton issued an Executive Order "to establish regular and meaningful consultation and collaboration with tribal officials" through "an accountable process" at each agency.<sup>83</sup> Independent regulatory agencies, including the NRC, were "encouraged to comply with the provisions of this order."<sup>84</sup> On January 9, 2017, the NRC published a Tribal Policy Statement, which consists of principles to guide the Staff's interactions with tribal governments, including government-to-government consultation.<sup>85</sup> It is intended to encourage

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<sup>78</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A),(D).

<sup>79</sup> See Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (June 2012), at 8-9, available at <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>.

<sup>80</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A)-(B).

<sup>81</sup> *Id.* § 800.2(c)(2)(ii)(C).

<sup>82</sup> *Id.*

<sup>83</sup> Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000).

<sup>84</sup> *Id.* at 67,251.

<sup>85</sup> Tribal Policy Statement, Fed. Reg. 2402 (Jan. 9, 2017).

and facilitate tribal involvement in activities under NRC jurisdiction and, among other things, expresses the agency's commitment to a government-to-government relationship with Indian tribes.<sup>86</sup> "Consultation" is defined in the statement of considerations to the Tribal Policy Statement as "efforts to conduct meaningful and timely discussions between the NRC and Tribal governments on the NRC's regulatory actions that have substantial direct effects on one or more Indian Tribes and those regulatory actions for which Tribal consultation is required under Federal statute."<sup>87</sup> The NRC's consultation process is intended to provide "opportunities for appropriate Tribal officials or representatives to meet with NRC management or staff to achieve a mutual understanding between the NRC and the Tribes of their respective interests and perspectives."<sup>88</sup>

Additionally, the NRC has adopted a Tribal Protocol Manual to guide the agency's interactions with Indian tribes.<sup>89</sup> In ruling on the petitions for review of the Board's Partial Initial Decision, the Commission stated that "in licensing reviews such as this one . . . we expect the Staff's actions to be guided by the principles outlined in the NRC's Tribal Protocol Manual."<sup>90</sup> The Tribal Protocol Manual states that in establishing a government-to-government relationship with federally recognized tribal governments, the NRC acknowledges the status of Tribes as domestic dependent sovereign nations, as being distinct from the status of special interest groups, stakeholders, non-governmental organizations, or members of the general public.<sup>91</sup> The Tribal Protocol Manual explains that government-to-government consultation with tribes "includes interactions between Tribal staff and to NRC staff, as well as interactions between

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<sup>86</sup> *Id.* at 2415, 2416.

<sup>87</sup> *Id.* at 2404.

<sup>88</sup> *Id.* The consultation process may include "providing for mutually-agreed protocols, timely communication, coordination, cooperation, and collaboration." *Id.*

<sup>89</sup> Tribal Protocol Manual, NUREG-2173 (Dec. 2014) (ADAMS Accession No. ML14274A014) [hereinafter Tribal Protocol Manual]. The Tribal Protocol Manual is currently under revision to conform its discussion of the NRC's trust responsibility to the revisions made in the *Federal Register* notice for the Tribal Policy Statement. See Staff Requirements Memorandum, SECY-16-0098, Tribal Consultation Policy Statement and Protocol (Dec. 2, 2016) (ADAMS Accession No. ML16337A035).

<sup>90</sup> *Powertech*, CLI-16-20, 84 NRC at 251 n.199 (citing Tribal Protocol Manual).

<sup>91</sup> Tribal Protocol Manual at 9.

staff and higher-level officials.”<sup>92</sup> The NRC considers interactions between representatives of the Federal government and tribal governments on issues within the scope of their authority to be “government-to-government” consultation. “These interactions may include information-sharing meetings, presentations, preliminary discussions, introductory briefings, information-gathering sessions, teleconferences, written correspondence, and telephone conversations between staff-level employees.”<sup>93</sup>

B. The National Environmental Policy Act

Congress enacted NEPA to ensure that Federal agencies make a “fully informed and well-considered decision”<sup>94</sup> on all “major Federal actions significantly affecting the quality of the human environment.”<sup>95</sup> The Council on Environmental Quality (CEQ) promulgates regulations that provide guidance on agency compliance with NEPA. While these regulations are not binding on the NRC where the agency has not expressly adopted them, they are entitled to considerable deference.<sup>96</sup> The NRC has also promulgated its own regulations governing the agency’s implementation of NEPA.<sup>97</sup> These regulations require that the Staff prepare an EIS in connection with a license issued under 10 C.F.R. Part 40 to possess and use source and 11(e)2 byproduct material for the purpose of in situ uranium recovery.<sup>98</sup> In accordance with 10 C.F.R. Part 51, the Staff prepared an FSEIS for the Dewey-Burdock project.<sup>99</sup>

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<sup>92</sup> *Id.* at 14.

<sup>93</sup> *Id.*

<sup>94</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

<sup>95</sup> 36 C.F.R. § 800.4(b)(1).

<sup>96</sup> *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725, 743 (3d Cir. 1989).

<sup>97</sup> *See generally* 10 C.F.R. Part 51.

<sup>98</sup> 10 C.F.R. § 51.10(b)(8).

<sup>99</sup> Exs. NRC-008-A-1 through NRC-008-B-2 [hereinafter FSEIS].

1. Requirement to Assess Effects on Dewey-Burdock Project on Cultural Resources

The CEQ's regulations state that the human environment "shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment."<sup>100</sup> They further state that, "[w]hen an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment."<sup>101</sup> The "effects" that should be discussed include "aesthetic, historic, cultural, economic, social, or health" effects, "whether direct, indirect, or cumulative."<sup>102</sup> A guidance document developed jointly by the CEQ and the NHPA notes that the term "cultural resources" covers a wider range of resources than just "historic properties," and includes "sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections."<sup>103</sup> Therefore, in contrast to the NHPA, which requires Federal agencies to consider the effects of a proposed project on "historic properties," or those properties listed on or eligible for listing on the National Register, NEPA requires agencies to consider all aspects of the cultural environment – which may include properties not considered to be "historic properties" under the NHPA.<sup>104</sup>

2. NEPA's "Hard Look" Standard

While NEPA "does not mandate particular results,"<sup>105</sup> it provides the necessary process to ensure that a Federal agency takes a "hard look" at the potential environmental impacts of a

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<sup>100</sup> 40 C.F.R. § 1508.14.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 1508.8.

<sup>103</sup> Ex. NRC-048, Council on Environmental Quality, Executive Office of The President, and Advisory Council on Historic Preservation, NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 (Mar. 2013), at 4.

<sup>104</sup> See *USEC, Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC 433, 448-49 (2006).

<sup>105</sup> *Muckleshoot Indian Tribe*, 177 F.3d at 814 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

proposed action<sup>106</sup> and discloses those impacts before moving forward with a planned action.<sup>107</sup> This “hard look” is intended to “foster both informed agency decision-making and informed public participation” so as to ensure that an agency does not act upon “incomplete information, only to regret its decision after it is too late to correct.”<sup>108</sup> The “hard look” standard, however, is tempered by a “rule of reason,” in that an agency’s NEPA document need only contain “a reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action.<sup>109</sup> Under NEPA’s rule of reason, an agency need not address every environmental effect that could potentially result from the proposed action. Rather, the agency need only provide “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]”<sup>110</sup>

While a Federal agency must analyze environmental consequences in its environmental review where it is “reasonably possible” to do so, NEPA’s rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.<sup>111</sup> Under Commission precedent, “NEPA [‘]should be construed in the light of reason if it is not to demand[‘] virtually infinite study and resources.”<sup>112</sup> Although the Staff can always gather more data in a particular area, it “must have some discretion to draw the line and move forward with decisionmaking.”<sup>113</sup>

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<sup>106</sup> See *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

<sup>107</sup> *Pogliani v. U.S. Army Corps of Engineers*, 306 F.3d 1235, 1237 (2d Cir. 2002) (citing *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100 (1983)).

<sup>108</sup> *Id.* at 88 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)).

<sup>109</sup> *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).

<sup>110</sup> *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980).

<sup>111</sup> *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002); see also 40 C.F.R. § 1502.22 (explaining how an agency should proceed when faced with incomplete or unavailable information).

<sup>112</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315 (quoting *NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (footnotes omitted) (quoting *NRDC v. Morton* 458 F.2d 827, 837 (D.C. Cir. 1972) (NEPA “must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research – and time – available to meet the Nation’s needs are not infinite.))).

<sup>113</sup> *Id.*

## DISCUSSION

The Board has retained jurisdiction over the final resolution of the outstanding issues identified by the Board in its Partial Initial Decision concerning Contentions 1A and 1B.<sup>114</sup> The Staff submits that there is no genuine issue as to any material fact with respect to the outstanding issues identified by the Board concerning Contentions 1A and 1B. Further, as set forth below, the material facts demonstrate that the Staff has fulfilled its responsibilities under the NHPA and NEPA with respect to the outstanding issues in Contentions 1A and 1B. Accordingly, the Board should find that the Staff is entitled to judgment as a matter of law on Contentions 1A and 1B, and dismiss this proceeding.

I. The Staff Has Satisfied Its Responsibility Under the NHPA to Engage in Meaningful Consultation with the Oglala Sioux Tribe (Contention 1B)

In its Partial Initial Decision, the Board held that the consultation process between the Staff and the Oglala Sioux Tribe was inadequate. While the Board found that it was “not able to decide definitively which party or specific actions led to the impasse preventing an adequate tribal cultural survey,”<sup>115</sup> the Board found the Staff at least partially at fault, stating that the Staff “has not held a single consultation session, on a government-to-government basis, solely with members of the Oglala Sioux Tribe.”<sup>116</sup> The Board acknowledged that the Staff sent numerous consultation letters to the Oglala Sioux Tribe and held several face-to-face meetings to which the Tribe was invited.<sup>117</sup> The Board found, however, that these efforts did not satisfy the NHPA, in part because the Staff did not hold individual meetings with the Oglala Sioux Tribe.<sup>118</sup> As a result, the Board concluded that “meaningful government-to-government consultation between the Oglala Sioux Tribe and the NRC Staff has not taken place.”<sup>119</sup> The Board stated that

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<sup>114</sup> *Powertech*, LBP-15-16, 81 NRC at 710.

<sup>115</sup> *Id.* at 656.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 656-58.

<sup>119</sup> *Id.* at 657.

additional consultation is required “to . . . satisfy the consultation requirements of the NHPA,”<sup>120</sup> and that, with respect to Contention 1B, the Staff “can remedy this deficiency in the Record of Decision in this proceeding by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe that may be impacted by the Powertech Dewey-Burdock project, and to adopt measures to mitigate such adverse effects, as necessary.”<sup>121</sup>

Under the NHPA, consultation between the Staff and the Oglala Sioux Tribe must afford the Tribe “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.”<sup>122</sup> The threshold step in this process, however, is the *identification* of sites of cultural, historic, or religious significance to the Tribe. Until such sites have been identified, consultation between the Staff and the Oglala Sioux Tribe on adverse effects and mitigation measures *specific to such sites* would not be fruitful. Further, sites of cultural, historic, or religious significance to the Oglala Sioux Tribe cannot be identified without the participation of the Tribe.<sup>123</sup> Therefore, consultation between the Staff and the Oglala Sioux Tribe concerning the Dewey-Burdock project has focused on efforts to facilitate the Tribe’s identification of cultural, historic or religious sites of significance to the Tribe.

A. The Staff Has Conducted Government-to-Government Consultation with the Oglala Sioux Tribe

The Staff’s record of government-to-government consultation with the Tribe prior to the issuance of the Board’s Partial Initial Decision is documented in its prior pleadings, testimony,

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 708.

<sup>122</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A).

<sup>123</sup> Bulletin 38. See also Ex. NRC-064 (Letter from John Yellow Bird Steele, President of the Oglala Sioux Tribe) at 2 (“It is self-evident that each tribe will have expertise in recognizing its own sacred sites. The Oglala Sioux Tribe strongly objects to the use of persons without any expertise in Sioux TCP to identify Sioux TCP.”). The Staff received similar input from other tribes.

and exhibits, herein incorporated by reference. Following the issuance of the Board's Partial Initial Decision, the Staff has diligently continued its efforts to consult on a government-to-government basis with the Oglala Sioux Tribe regarding the impacts of the Dewey-Burdock project on sites of cultural, historic, or religious significance to the Tribe. In accordance with the Board's Partial Initial Decision, on June 23, 2015, the Staff issued a letter to the President of the Oglala Sioux Tribe reiterating the Staff's ongoing commitment to consultation with the Tribe on the Dewey-Burdock project and extending an invitation for the Oglala Sioux Tribe to meet with the Staff on a government-to-government basis.<sup>124</sup> Consistent with guidance in the Tribal Protocol Manual,<sup>125</sup> the Staff identified the officials who would represent the NRC in a government-to-government meeting with the Tribe, and requested the identity of the Oglala Sioux Tribe individuals viewed by the Tribe as the appropriate representatives for government-to-government consultation with the NRC.<sup>126</sup>

By letter dated August 26, 2015, the Staff responded to a letter received on July 22, 2015, from the Oglala Sioux Tribe's then-Tribal Historic Preservation Officer (THPO), Mr. Dennis Yellow Thunder, which requested clarification of the roles and responsibilities of the Staff's consulting officials, as well as the Staff's plans to fulfill its responsibilities under the NHPA and NEPA.<sup>127</sup> In its response, the Staff provided an organizational chart of the responsible Staff office and clarified that the Staff intends to use any additional information it obtains from the Oglala Sioux Tribe to supplement both its NHPA and NEPA reviews.<sup>128</sup> The Staff also reiterated its invitation to the Tribe to meet with the Staff on a government-to-government basis, describing the purpose of such a meeting as introducing the Staff's new

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<sup>124</sup> NRC Staff's Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (Attachment 1), at ¶ 11 [hereinafter Statement of Material Facts].

<sup>125</sup> The Tribal Protocol Manual states that consultation often includes "identifying . . . staff level points of contact[.]" Tribal Protocol Manual at 14.

<sup>126</sup> Statement of Material Facts at ¶ 11.

<sup>127</sup> *Id.* at ¶¶ 12-13.

<sup>128</sup> *Id.* at ¶ 13.

management team to the Tribe and working with the Tribe to resolve the issues identified by the Board in its Partial Initial Decision.<sup>129</sup> The Staff requested that the Tribe provide possible meeting dates and locations for such a meeting by mid-September 2015.<sup>130</sup>

On September 24, 2015, the Staff received a letter from the Oglala Sioux Tribe's THPO expressing the Tribe's appreciation for the Staff's offer to help arrange a meeting to introduce the Staff's new management team and to work toward compliance with the Board's Partial Initial Decision.<sup>131</sup> The Tribe requested that such a meeting take place in Pine Ridge, South Dakota, and that the Staff provide a range of potential dates for such a meeting.<sup>132</sup> After receiving the Tribe's letter, the Staff attempted unsuccessfully to reach the Tribe's THPO by telephone and email to coordinate dates for the government-to-government meeting.<sup>133</sup> Between September and November 2015, the Staff continued its efforts to reach the Oglala Sioux Tribe by email, letter and telephone to further government-to-government consultation on the Dewey-Burdock project.<sup>134</sup> These attempts likewise did not elicit a response from the Oglala Sioux Tribe.<sup>135</sup> In its communications to the Tribe, the Staff reiterated its interest in holding a government-to-government meeting with the Oglala Sioux Tribe regarding the Dewey-Burdock project.<sup>136</sup>

On December 17, 2015, absent input from the Tribe regarding dates for the government-to-government meeting, the Staff issued a letter to the President of the Oglala Sioux Tribe

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<sup>129</sup> *Id.* See also Tribal Protocol Manual at 18 (The Staff should share its proposed agenda for government-to-government meetings with the consulting tribe).

<sup>130</sup> Statement of Material Facts at ¶ 13.

<sup>131</sup> *Id.* at ¶ 14.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at ¶¶ 15-16; Affidavit of Kellee L. Jamerson Concerning the Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (Attachment 2), at ¶ 3 [hereinafter Jamerson Declaration].

<sup>134</sup> The Staff's efforts included telephone calls placed to the Oglala Sioux Tribe's THPO office; emails sent to Mr. Yellow Thunder, the Tribe's THPO; a letter to the President of the Oglala Sioux Tribe, detailing the Staff's difficulty reaching the Tribe's THPO and reiterating the Staff's interest in meeting with the Tribe; and an email to Mr. Jeffrey Parsons and Mr. Travis Stills, counsel for the Oglala Sioux Tribe, conveying the aforementioned letter and emails and enquiring as to whether the Tribe's contact information had changed. Statement of Material Facts at ¶¶ 12-20; Jamerson Declaration at ¶ 4.

<sup>135</sup> On December 1, 2015, counsel for the Oglala Sioux Tribe responded to the Staff via email, stating that the Oglala Sioux Tribe THPO office was "very busy" and that he was not aware of the Staff providing any proposed dates for the government-to-government meeting. *Id.* at ¶ 21.

<sup>136</sup> See, e.g., *id.* at ¶¶ 15, 18.

proposing holding the meeting with the Tribe in Pine Ridge, South Dakota, during the month of February 2016.<sup>137</sup> Acknowledging the difficulty of coordinating a date for the meeting that may be suitable for both parties, the Staff requested that the Tribe provide alternate dates if those presented were not convenient to the Tribe. The Staff reiterated its recognition of the need to meet the Oglala Sioux Tribe on a government-to-government basis, and stated that the purpose of such a meeting would be to introduce the Staff's management team responsible for the Dewey-Burdock project to the Tribe, as well as to work with the Tribe to resolve the issues identified by the Board in its Partial Initial Decision.<sup>138</sup> During the winter and spring of 2016, counsel for the Oglala Sioux Tribe and counsel for the Staff worked to coordinate dates for the government-to-government meeting between the Staff and the Tribe.<sup>139</sup>

On May 19, 2016, the Staff and the Oglala Sioux Tribe held a government-to-government meeting in Pine Ridge, South Dakota.<sup>140</sup> The meeting's participants included a member of the Oglala Sioux Tribe's Executive Committee, the Oglala Sioux Tribe's THPO, the Staff's Director of the Division of Fuel Cycle Safety, Safeguards and Environmental Review – Office of Nuclear Material Safety and Safeguards, and the Staff's project managers responsible for oversight of the Dewey-Burdock project.<sup>141</sup> In addition to serving to introduce the Staff to the Oglala Sioux Tribe's representatives, the meeting "constituted the first step and building block for moving forward with the consultation process to gather information about historic and cultural resources of significance to the Oglala Sioux Tribe that could be affected by the construction and operation of the Dewey-Burdock" project.<sup>142</sup> Among other matters, the Staff and the Tribe discussed the Tribe's objections to and concerns with the Programmatic Agreement, the

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<sup>137</sup> *Id.* at ¶ 22.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at ¶ 23. During that time, counsel for the Oglala Sioux Tribe informed counsel for the Staff that the Tribe's Cultural Resources and Historic Preservation Office had undergone significant restructuring, and that Ms. Trina Lone Hill had replaced Mr. Yellow Thunder as the Oglala Sioux Tribe's THPO. *Id.*

<sup>140</sup> *Id.* at ¶ 24; Jamerson Declaration at ¶ 5.

<sup>141</sup> Statement of Material Facts at ¶ 24.

<sup>142</sup> *Id.*

continued effectiveness of Powertech's license, and the tribal survey of the Dewey-Burdock site conducted in 2013. The Oglala Sioux Tribe committed to providing the Staff with specific citations to tribal laws and ordinances prohibiting nuclear activities within tribal treaty lands, and the Staff committed to considering these laws and ordinances as part of the consultation process.<sup>143</sup>

On August 16, 2016, the Staff reached out to the Oglala Sioux Tribe's THPO to request the citations to the tribal laws and ordinances referenced in the government-to-government meeting. The Staff also requested that the Tribe telephone the Staff to discuss the Tribe's thoughts concerning conducting a further survey.<sup>144</sup> Later that month, the Staff attempted to contact the Tribe by phone to pursue the matters raised in the Staff's email.<sup>145</sup> During a teleconference with the Board and parties on November 7, 2016, counsel for the Staff reiterated the Staff's commitment to continuing to engage in government-to-government consultation with the Tribe, and to working with the Tribe to hold a survey of the Dewey-Burdock project area for sites of cultural, historic, or religious significance to the Tribe.<sup>146</sup>

On November 23, 2016, the Staff issued an invitation to the Oglala Sioux Tribe to engage in further consultation on the parameters of an additional survey of the Dewey-Burdock site.<sup>147</sup> The Staff proposed that a meeting should be held by teleconference in December 2016 or January 2017, or another timeframe suitable to the Tribe. The Staff also reiterated its willingness to consider as part of the consultation process the tribal laws and ordinances alluded to by the Tribe in the May 19, 2016 meeting.<sup>148</sup> In December 2016, the Staff attempted unsuccessfully to reach the Oglala Sioux Tribe's THPO by telephone and email regarding its

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at ¶ 25; Jamerson Declaration at ¶ 5.

<sup>145</sup> Statement of Material Facts at ¶ 26; Jamerson Declaration at ¶ 5.

<sup>146</sup> *Id.* at ¶ 28.

<sup>147</sup> *Id.* at ¶ 29; Jamerson Declaration at ¶ 6.

<sup>148</sup> Statement of Material Facts at ¶ 29.

invitation to participate in a teleconference with the Staff.<sup>149</sup> However, on January 13, 2017, the THPO for the Oglala Sioux Tribe responded to the Staff's letter, agreeing to a teleconference with the Staff that would entail, in addition to "government-to-government consultation between the Oglala Sioux Tribe and the United States," a discussion of "mechanisms to address issues concerning other parties with an interest in these issues in context of the NHPA/NEPA process" and "Powertech's stated unwillingness to meet its financial obligations for NRC Staff to complete its statutory mandates related to cultural resources" affected by the Dewey-Burdock project.<sup>150</sup>

On January 31, 2017, the Staff and the Oglala Sioux Tribe held a meeting by teleconference to discuss several issues relating to the identification of cultural resources at the Dewey-Burdock project site, including the perspectives of the parties concerning a proposed survey for tribal historic and cultural resources at the Dewey-Burdock site.<sup>151</sup> At that meeting, the Staff and the Oglala Sioux Tribe agreed to hold a teleconference tentatively scheduled for the beginning of April 2017 to continue consultation on a cultural resources survey. The Tribe committed to providing the Staff with information about a tribal survey approach by mid-March 2017 to aid in the discussion and establishment of such a survey.<sup>152</sup> In February 2017, the Staff reached out to the Oglala Sioux Tribe's THPO by email requesting the Tribe's availability in the beginning of April for a further teleconference.<sup>153</sup> On March 17, 2017, counsel for the Oglala Sioux Tribe informed the Staff that the Tribe was working to provide the Oglala Sioux Tribe's concept for a survey approach, as they committed, and a date in early April that would work for a teleconference.<sup>154</sup>

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<sup>149</sup> *Id.* at ¶¶ 30-31; Jamerson Declaration at ¶ 6.

<sup>150</sup> Statement of Material Facts at ¶ 32.

<sup>151</sup> *Id.* at ¶ 34; Jamerson Declaration at ¶ 7.

<sup>152</sup> Statement of Material Facts at ¶ 34; Jamerson Declaration at ¶ 7.

<sup>153</sup> Statement of Material Facts at ¶¶ 36-37.

<sup>154</sup> *Id.* at ¶ 38; Jamerson Declaration at ¶ 7. Counsel for the Tribe stated that they would let the Staff know "as soon as possible." Statement of Material Facts at ¶ 38.

On April 14, 2017, having received neither the promised input from the Tribe regarding a tribal survey approach, nor the Tribe's availability for a teleconference on that matter, the Staff issued an invitation to the Oglala Sioux Tribe to participate in a tribal site survey of the Dewey-Burdock project area on dates of the Tribe's selection between mid-May and the end of July 2017.<sup>155</sup> The Staff issued the survey invitation in order to maintain communication with the Oglala Sioux Tribe and to provide the Tribe with a broad window for selection of survey dates before the onset of unfavorable weather in early autumn, taking into account the Tribe's unavailability during the month of July due to the Sun Dance ceremonies.<sup>156</sup> In response to a notification by counsel for the Oglala Sioux Tribe that Ms. Lone Hill was no longer the Tribe's THPO, the Staff reached out to the Tribe, the ACHP, and the South Dakota SHPO, to determine who the Staff should contact regarding continuing consultation on the Dewey-Burdock project and other NRC projects.<sup>157</sup> In consequence of the Staff's understanding that Ms. Lone Hill had been absent from the position for approximately one week and had already been reinstated, the Staff reissued the survey invitation to the Oglala Sioux Tribe's THPO and President, and included an additional range of dates from which the Tribe could select for a tribal survey of the Dewey-Burdock project area.<sup>158</sup>

On May 31, 2017, the Oglala Sioux Tribe responded to the Staff's invitation to participate in a survey of the Dewey-Burdock site.<sup>159</sup> In its letter, the Tribe stated that for "the multiple reasons presented to NRC Staff on the record in the past, and reiterated in this letter," the Staff's "proposal remains unacceptable in its current form."<sup>160</sup> The Tribe described its objections to the survey opportunity offered by the Staff and referred to information from the administrative records for the Dewey-Burdock and Crow Butte license renewal proceedings that reflected the

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<sup>155</sup> *Id.* at ¶ 39; Jamerson Declaration at ¶ 7.

<sup>156</sup> Statement of Material Facts at ¶ 46; Jamerson Declaration at ¶ 7.

<sup>157</sup> Statement of Material Facts at ¶ 41.

<sup>158</sup> *Id.* at ¶¶ 41-42.

<sup>159</sup> *Id.* at ¶ 45; Jamerson Declaration at ¶ 8.

<sup>160</sup> Statement of Material Facts at ¶ 45.

Oglala Sioux Tribe's position regarding the Staff's survey proposal.<sup>161</sup> The Tribe also asserted that "there must be an effort to coordinate the several different Lakota Sioux Tribes before designing and conducting a cultural resources survey."<sup>162</sup> The Tribe explained, "[w]hile the Office understands that NRC Staff is under an obligation to conduct consultation meetings with the Oglala Sioux Tribe specifically, and the Office wishes to take part in those, coordination of a cultural resources survey must include the other Lakota Sioux tribal governments at the earliest stages in order to be competent in its analysis of Lakota Sioux cultural resources."<sup>163</sup>

On July 24, 2017, the Staff responded to the Oglala Sioux Tribe's May 31, 2017 letter. The Staff acknowledged that the Tribe considered the Staff's offered site survey opportunity to be unacceptable and indicated that the Staff took this statement to convey the Tribe's rejection of the offer.<sup>164</sup> The Staff explained that in the teleconference meeting held on January 31, 2017, the Staff had presented the Tribe with a preliminary survey approach as a starting point for discussions regarding a mutually acceptable survey approach. During the teleconference meeting, the Tribe had expressed its disappointment regarding the preliminary survey approach and committed to providing specific information concerning the Tribe's desired parameters of a site survey by mid-March 2017 and to engage in further discussions with the Staff in the April 2017 timeframe concerning the Tribe's proposal. Throughout this period and thereafter, the Staff continued to seek this input from the Tribe, as well as information concerning the Tribe's availability for further discussions regarding the parameters of a site survey. The Staff explained that, in the absence of the specific input from the Oglala Sioux Tribe, the Staff had

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<sup>161</sup> *Id.*; see also Jamerson Declaration at ¶ 8.

<sup>162</sup> Statement of Material Facts at ¶ 45; see also Jamerson Declaration at ¶ 8.

<sup>163</sup> *Id.* The Oglala Sioux Tribe's response to the Staff's survey invitation contained other information and requests not further described in this Motion. For example, the Tribe requested that significant further discussion take place on a face-to-face basis, and requested that the Staff identify the decision-maker for its NHPA consultation process. See *id.*

<sup>164</sup> *Id.* at ¶ 46; see also Jamerson Declaration at ¶ 8.

offered the open site survey and honorarium to afford the Tribe the flexibility to select and use a survey methodology that it deemed acceptable for the identification of its own sites of cultural, historical, and religious significance.<sup>165</sup>

As explained the Staff's July 24, 2017 letter to the Tribe, the positions raised in the Oglala Sioux Tribe's May 31 letter – including but not limited to the length of the site survey, the survey methodology, and the requirement that the Staff coordinate with the governments of all Lakota Sioux Tribes before designing a cultural resources survey – appear to be far apart from the discussions in the May 19, 2016, government-to-government meeting, the January 31, 2017, teleconference, and the reasonable opportunity to identify cultural resources described in the Staff's letters to the Tribe dated April 14, 2017, and May 8, 2017.<sup>166</sup> In light of the Oglala Sioux Tribe's views regarding the design and conduct of a site survey, and the more than two years of consultation that have occurred since the Board's Partial Initial Decision, the Staff reluctantly recognizes that further consultation is unlikely to result in a mutually acceptable settlement of the dispute regarding the outstanding contentions.<sup>167</sup> Nevertheless, because the Staff has diligently and proactively consulted with the Tribe on a government-to-government basis to identify sites of cultural, historic, or religious significance to the Tribe that may be affected by the Dewey-Burdock project, in order to identify any adverse effects to such sites and implement appropriate mitigation measures, the Staff has satisfied its consultation responsibilities under Section 106 of the NHPA.

B. This Consultation Afforded the Oglala Sioux Tribe a Reasonable Opportunity to Identify Its Concerns About Impacts to Its Sites of Cultural, Historic, and Religious Importance

While the Section 106 consultation process did not ultimately result in a survey of the Dewey-Burdock project area by the Tribe, the Staff's efforts to consult with the Tribe have been

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<sup>165</sup> *Id.*

<sup>166</sup> *See id.*; Jamerson Declaration at ¶ 8.

<sup>167</sup> *See* Statement of Material Facts at ¶ 46; Jamerson Declaration at ¶ 8.

both meaningful and reasonable. Throughout the consultation process, the Staff afforded the Oglala Sioux Tribe a reasonable opportunity to identify its concerns about the cultural, historic or religious sites of significance to the Oglala Sioux Tribe that may be impacted by the Powertech Dewey-Burdock project. As discussed below, there were several components to the Staff's efforts to fulfill its Section 106 consultation responsibilities, including taking part in government-to-government meetings with the Tribe; actively soliciting the Tribe's views regarding any Oglala Sioux cultural, historical or religious sites; and endeavoring to facilitate a survey of the Dewey-Burdock project area for sites of cultural, historic or religious importance to the Tribe.

Subsequent to the issuance of the Board's Partial Initial Decision, as described above, the Staff promptly reaffirmed its commitment to government-to-government consultation with the Oglala Sioux Tribe, and endeavored for nearly a year to arrange a meeting between the Staff and the Tribe to resolve the issues identified by the Board in its Partial Initial Decision.<sup>168</sup> In this meeting and in the subsequent teleconference between the Staff and the Oglala Sioux Tribe, the Staff listened to the concerns of the Tribe regarding the Dewey-Burdock project and sought the Tribe's input on a survey of the Dewey-Burdock site for cultural, historic or religious sites of significance to the Oglala Sioux Tribe.<sup>169</sup> The Staff attempted to continue its discussions with the Oglala Sioux Tribe on these matters in a further teleconference, but despite the Tribe's expressed commitment to participating in another teleconference with the Staff, the Staff was unable to obtain from the Tribe its availability for such a discussion in the timeframe discussed by the parties.<sup>170</sup>

In addition to seeking the Oglala Sioux Tribe's participation in meetings with the Staff to discuss the Tribe's concerns about the Dewey-Burdock project,<sup>171</sup> the Staff actively sought

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<sup>168</sup> See Statement of Material Facts at ¶¶ 11, 13, 15-20, 22-23; Jamerson Declaration at ¶¶ 3-5.

<sup>169</sup> See Statement of Material Facts at ¶¶ 24, 34.

<sup>170</sup> See *id.* at ¶¶ 35-39; Jamerson Declaration at ¶ 7.

<sup>171</sup> These concerns were not limited to the outstanding issues identified by the Board in its Partial Initial Decision with respect to Contentions 1A and 1B – *i.e.*, the inadequacy of the consultation record under the NHPA and the FSEIS's consideration of the Oglala Sioux Tribe's cultural, historic and religious

information from the Tribe about its views regarding any Oglala Sioux cultural, historical or religious sites that may be impacted by the Dewey-Burdock Project. The Staff reiterated its interest in considering any information the Tribe was willing to provide in its communications with the Tribe;<sup>172</sup> in its meetings with the Tribe;<sup>173</sup> and in the teleconference with the Board and parties, including the Tribe.<sup>174</sup> The Staff committed to using any information provided by the Oglala Sioux Tribe in its NEPA and NHPA reviews.<sup>175</sup>

Finally, the Staff endeavored to consult with the Tribe to facilitate a survey of the Dewey-Burdock project area for sites of cultural, historic or religious importance to the Oglala Sioux Tribe. In its May 19, 2016 meeting with the Staff, the Oglala Sioux Tribe expressed that the previous tribal site survey “was incomplete and the survey methodology lacked scientific integrity”<sup>176</sup> and that an additional survey of the Dewey-Burdock project area was necessary for the Oglala Sioux Tribe to identify its sites of cultural, historic or religious importance.<sup>177</sup> The Tribe expressed generally that other Lakota Sioux tribes should be involved in the development

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resources. The Tribe also expressed its concerns to the Staff about the continuing effectiveness of the license in light of the Board’s ruling, as well as tribal laws and ordinances prohibiting nuclear activities within tribal treaty lands. See Statement of Material Facts at ¶ 24. By letter dated November 23, 2016, Staff responded to the Tribe’s concerns regarding the continuing effectiveness of the license. *Id.* at ¶ 29. The Staff also committed to considering the Tribe’s laws and ordinances as part of the consultation process; however, the Tribe did not provide the Staff any further information concerning these laws and ordinances. See *id.* at ¶ 24.

<sup>172</sup> See *id.* at ¶ 11 (“[T]he NRC staff renews its request for your views regarding any Sioux cultural, historical or religious sites that may be impacted by the Dewey-Burdock Project. Your response will ensure that relevant information is properly captured in the PA and considered during the development of mitigation measures.”); ¶ 13 (The Staff “intends to use any additional information it obtains from the Oglala Sioux Tribe to supplement both our NHPA and NEPA reviews.”).

<sup>173</sup> See *id.* at ¶ 34 (The Staff “asked the Tribe whether it would be willing to share information about known cultural and historic resources that may be impacted by the Dewey-Burdock project”).

<sup>174</sup> See *id.* at ¶ 28 (“We are willing to take any information that the Oglala Sioux Tribe is willing to provide on . . . historic and cultural resources of interest to them. Anything that they are willing to provide, we would be thrilled to have”; “[T]he issue in this case is that we have not received anything . . . specific to the Oglala Sioux Tribe, and that’s why we were not able to document it as a NEPA analysis, so any information would be of great value to us and would enable us to protect this through mitigation measures, through the programmatic agreement, et cetera.”).

<sup>175</sup> *Id.* at ¶ 13.

<sup>176</sup> *Id.* at ¶ 24; see also *id.* at ¶ 45 (expressing the Oglala Sioux Tribe’s views concerning the appropriate methodology for conducting a survey).

<sup>177</sup> *Id.*

and/or implementation of the survey.<sup>178</sup> The Tribe also expressed its desire for a contractor to facilitate and carry out the survey.<sup>179</sup>

Throughout its consultation efforts following the Board's Partial Initial Decision, the Staff has agreed that the Oglala Sioux Tribe should have another opportunity to conduct a survey of the Dewey-Burdock project area for its cultural resources.<sup>180</sup> In view of the Tribe's general expressions of concern about the methodology used to conduct a tribal survey and a desire to involve other tribal participants,<sup>181</sup> the Staff sought specific input from the Tribe regarding its views regarding a survey methodology and approach, the number of tribal representatives that should participate the survey, the terms of cost or reimbursement for the survey, and a survey timeframe, in order to further discussions with the Tribe on designing a mutually agreeable survey opportunity.<sup>182</sup> In the January 31, 2017, teleconference, the Tribe stated that its preferred approach was a survey methodology similar in nature to the Tribe's previous Makoche Wowapi survey proposal.<sup>183</sup> Nevertheless, the Tribe committed to providing the Staff with information on an acceptable tribal survey approach by mid-March 2017. Ultimately, when the Oglala Sioux Tribe did not provide this information, the Staff moved forward with an invitation to the Tribe to participate in a tribal site survey of the Dewey-Burdock project area.<sup>184</sup> As the Staff

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<sup>178</sup> *Id.* at ¶¶ 14, 24, 32, 45.

<sup>179</sup> Counsel for the Oglala Sioux Tribe informed counsel for the Staff, after the Staff had issued its invitation to participate in a tribal survey of the Dewey-Burdock site, that the Tribe expected to provide a response to the Staff "that will expand on the Tribe's stated position that key features of a survey should include a qualified contractor to coordinate a survey among the several interested Sioux Tribes based on accepted methodologies and professional standards to identify cultural, religious, and historic resources and the potential adverse effects to those resources." *Id.* at ¶ 40. In its May 31, 2017, response to the Staff's invitation to participate in a site survey, the Tribe stated that "the best manner to conduct a proper survey is to involve a contractor(s) with the necessary experience, training, and cultural knowledge to carry out and facilitate the survey." *Id.* at ¶ 45.

<sup>180</sup> *See, e.g., id.* at ¶¶ 24, 25, 28, 34, 39, 42.

<sup>181</sup> *See, e.g., id.* at ¶¶ 14, 24, 32, 34.

<sup>182</sup> *Id.* at ¶ 34; *see also* Jamerson Declaration at ¶ 7.

<sup>183</sup> *Id.* The Board found that "some of the [Oglala Sioux Tribe's] demands to engage with the NRC Staff were patently unreasonable," referring in part to "the funds requested to collect tribal cultural information" associated with the Makoche Wowapi proposal and comparable survey efforts. *Powertech*, LBP-15-16, 81 NRC at 656-57 & n.229 (citing Transcript of Proceedings at 807, 810).

<sup>184</sup> Statement of Material Facts at ¶ 39; Jamerson Declaration at ¶ 7.

had explained in its January 2017 teleconference with the Tribe, the Staff believed the open site approach provided the Oglala Sioux Tribe the flexibility of conducting a tribal survey using any survey methodology that the Tribe found acceptable to identify the cultural, historic, and religious sites of importance to the Tribe.<sup>185</sup>

By letter dated May 31, 2017, the Oglala Sioux Tribe stated that the Staff's survey offer was unacceptable to the Tribe.<sup>186</sup> The Tribe excerpted testimony from the Crow Butte license renewal proceeding, in which a former Oglala Sioux Tribe THPO had testified regarding the Tribe's position on the length and methodology of a survey for sites of cultural, historic, and religious significance to the Tribe.<sup>187</sup> With this letter, the Oglala Sioux Tribe also informed the Staff that the Staff must coordinate the participation of all of the Lakota Sioux tribes in the development of a survey approach as a precondition to moving forward with the Oglala Sioux Tribe on the development of a survey for sites of cultural, historic, and religious importance to the Oglala Sioux Tribe at the Dewey-Burdock site.<sup>188</sup> In view of the positions raised by the Tribe

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<sup>185</sup> Statement of Material Facts at ¶ 34; see also Jamerson Declaration at ¶ 7.

<sup>186</sup> Statement of Material Facts at ¶ 45; Jamerson Declaration at ¶ 8.

<sup>187</sup> For example, Mr. Michael Catches-Enemy, a former THPO of the Oglala Sioux Tribe, testified:

So a TCP survey is quite extensive, and that's why I didn't want to limit to maybe even just one year. I would say a couple years. When you're talking about that large of an audience, as far as that many tribes to be involved, to get a good feel for the area, maybe in different seasons – maybe they want to be out there when the ground visibility is the best, or maybe there are ceremonies to be performed during that time at the elders' discretion.

Statement of Material Facts at ¶ 45.

<sup>188</sup> “[C]oordination of a cultural resources survey must include the other Lakota Sioux tribal governments at the earliest stages in order to be competent in its analysis of Lakota Sioux cultural resources.” *Id.* In its email dated September 29, 2015, the Staff indicated its willingness to meet with other parties invited by the Oglala Sioux Tribe as part of the consultation process. *Id.* at ¶ 15. Ultimately, the Oglala Sioux Tribe informed the Staff that it would be willing to “conduct a meeting with only Oglala Sioux Tribe and NRC Staff representatives, followed by an opportunity to update other tribes that show interest.” *Id.* at ¶ 23. The government-to-government meeting between the Staff and the Oglala Sioux Tribe was held without the participation of other Lakota Sioux tribes. See *id.* at ¶ 24. The subsequent January 31, 2017 teleconference between the Staff and the Oglala Sioux Tribe was also held without the participation of other Lakota Sioux tribes. See *id.* at ¶ 34. Although the stated purpose of the teleconference was to discuss the parameters of a tribal survey of the Dewey-Burdock site, see *id.* at ¶¶ 28, 29, 31, 33, the Tribe did not inform the Staff that the participation of all of the Lakota Sioux tribes was necessary for the purposes of this discussion, and in fact committed in that meeting to providing the Oglala Sioux Tribe's

in its May 31, 2017 letter, which appeared to the Staff to be increasingly far apart from the Staff's previous discussions with the Tribe and the offered survey opportunity, and recognizing the more than two years of consultation that have taken place since the Board's ruling, the Staff determined that further consultation with the Oglala Sioux Tribe would not be likely to result in a mutually acceptable settlement of the dispute regarding the outstanding contentions.<sup>189</sup>

The NHPA does not obligate the Staff to identify properties of traditional religious and cultural importance to a Tribe if such information cannot be obtained. Rather, the NHPA requires that the Federal agency consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency's undertaking<sup>190</sup> and, in doing so, afford the Indian tribe a reasonable opportunity to identify its concerns about such properties.<sup>191</sup> Here, there is no genuine issue of material fact regarding the efforts of the Staff to conduct meaningful government-to-government consultation with Oglala Sioux Tribe over the last seven years. The material facts demonstrate that in accordance with the NHPA, the Staff has, through government-to-government consultation with the Oglala Sioux Tribe, afforded the Tribe a reasonable opportunity to identify its concerns about historic properties that may be affected by the Dewey-Burdock project and to advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to the Tribe.<sup>192</sup> Since the consultation process has not resulted in the identification of any such properties, it has therefore not been possible for the Staff and the Oglala Sioux Tribe to consult to identify

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input on a tribal survey approach within two months to support a further teleconference on the development of the survey. *Id.* at ¶ 34.

<sup>189</sup> *Id.* at ¶ 46; Jamerson Declaration at ¶ 8.

<sup>190</sup> 54 U.S.C. § 302706(b); *see also* 36 C.F.R. § 800.2(c)(2)(ii).

<sup>191</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A).

<sup>192</sup> Moreover, in resolving Contention 1A, the Board held that the Staff satisfied its obligation under the NHPA to make a reasonable and good faith effort to identify historic properties in the Dewey-Burdock area. *Powertech*, LBP-15-16, 81 NRC at 654. Under the ACHP's regulations, historic properties *include* eligible properties of religious and cultural significance to consulting Indian tribes, such as those of the Oglala Sioux Tribe.

adverse effects specific to such identified properties or to adopt measures to avoid, minimize, or mitigate adverse effects to these properties.<sup>193</sup>

In summary, the Staff has satisfied its obligation under the NHPA to conduct meaningful consultation with the Oglala Sioux Tribe.<sup>194</sup> Accordingly, the Board should find that the Staff is entitled to judgment as a matter of law on Contention 1B.

II. The Staff Has Satisfied Its Responsibility Under NEPA to Take a Hard Look at the Impacts of the Dewey-Burdock Project on Cultural Resources (Contention 1A)

In its Partial Initial Decision, the Board held that the Staff had complied with the NHPA's requirement to make a good faith and reasonable effort to identify historic properties within the Dewey-Burdock project area.<sup>195</sup> However, the Board held that the Staff had not satisfied the requirement under NEPA to take a "hard look" at the impacts of the Dewey-Burdock project on Sioux cultural resources because the FSEIS did not adequately address the Oglala Sioux Tribe's cultural, historical, and religious sites or include mitigation measures sufficient to protect such sites.<sup>196</sup> The Board stated that additional consultation is required "to . . . satisfy the hard look at impacts required by NEPA, and to supplement the FSEIS, if necessary,"<sup>197</sup> and that, with respect to Contention 1B:

The Staff can remedy this deficiency in the Record of Decision in this proceeding by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe which may be impacted by the Powertech Dewey-Burdock project, and to adopt measures to mitigate such adverse effects, as necessary. The FSEIS and Record of Decision in this case must be supplemented, if necessary, to include any cultural, historic or religious sites

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<sup>193</sup> Further, the Dewey-Burdock Programmatic Agreement sets forth the process the Staff must follow to complete the identification and evaluation of historic properties, assess adverse effects, and develop measures to avoid, minimize, or mitigate those effects. As the Staff implements the Dewey-Burdock Programmatic Agreement, it will do so in consultation with interested Tribes. Under the Programmatic Agreement, the Oglala Sioux Tribe will have the option of consulting with the Staff on the future identification and evaluation of historic properties, as well as the assessment of adverse effects and development of measures to avoid, minimize, or mitigate adverse effects to identified properties.

<sup>194</sup> See *Powertech*, LBP-15-16, 81 NRC at 657-58, 708. Further, as described in this Motion, the Staff has conducted its consultation activities consistent with the guidance in the Tribal Protocol Manual.

<sup>195</sup> *Id.* at 654.

<sup>196</sup> *Id.* at 654-55, 57-58, 708.

<sup>197</sup> *Id.* at 657.

identified and to discuss any mitigation measures necessary to avoid any adverse effects.<sup>198</sup>

When preparing an EIS, the Staff must take a “hard look” at the environmental impacts of its proposed action.<sup>199</sup> The “hard look” standard is, however, subject to NEPA’s “rule of reason.”<sup>200</sup> Under NEPA’s rule of reason, the Staff need not address every environmental effect that could potentially result from the proposed action. Rather, the Staff need only provide “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]”<sup>201</sup> While the Staff must analyze environmental consequences in an EIS where it is “reasonably possible” to do so, NEPA’s rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.<sup>202</sup> Under Commission precedent, “[a]n environmental impact statement is not intended to be ‘a research document,’”<sup>203</sup> and the Staff is not required to analyze every conceivable aspect of a proposed project.<sup>204</sup> Although the Staff can always gather more data in a particular area, it “must have some discretion to draw the line and move forward with decisionmaking.”<sup>205</sup>

Under NEPA’s “hard look” standard, the proper inquiry is not whether the Staff obtained complete information on sites of cultural, historical, and religious to the Oglala Sioux Tribe, but whether the Staff made reasonable efforts to do so.<sup>206</sup> To obtain complete information on the Oglala Sioux Tribe’s cultural resources, the Staff needed input from the Tribe itself.<sup>207</sup> The existence and significance of sites of cultural, historical, and religious importance to the Oglala

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<sup>198</sup> *Id.* at 708.

<sup>199</sup> *Methow Valley Citizens Council*, 490 U.S. at 350.

<sup>200</sup> *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

<sup>201</sup> *Trout Unlimited*, 509 F.2d at 1283; *Warm Springs Dam Task Force*, 621 F.2d at 1026-27..

<sup>202</sup> *Kern v. Bureau of Land Mgmt.*, 284 F.3d at 1072; see also 40 C.F.R. § 1502.22 (explaining how an agency should proceed when faced with incomplete or unavailable information).

<sup>203</sup> *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002).

<sup>204</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315 (footnote omitted).

<sup>205</sup> *Id.*

<sup>206</sup> *Ground Zero Ctr. for Non-Violent Action*, 383 F.3d 1082 at 1089-90; *Warm Springs*, 621 F.2d at 1026-27; *Pilgrim*, CLI-10-11, 71 NRC at 315.

<sup>207</sup> See Bulletin 38 at 7-10.

Sioux Tribe must, necessarily, be determined by the Oglala Sioux Tribe, as the community that ascribes this significance to them.<sup>208</sup>

The Staff's efforts in the years prior to the Board's Partial Initial Decision to take a hard look at how the Dewey-Burdock project may affect Sioux cultural resources are documented in its prior pleadings, testimony, and exhibits, herein incorporated by reference. The Staff's subsequent efforts are detailed in the Staff's discussion relating to its resolution of the issues identified by the Board in Contention 1B, above. In short, in the more than two years since the issuance of the Board's Partial Initial Decision, despite these documented efforts of the Staff to engage in government-to-government consultation with the Oglala Sioux Tribe for the purpose of obtaining information on cultural, historic or religious sites of significance to the Tribe, the Tribe has not provided information on such sites to the Staff. Nor has the Oglala Sioux Tribe provided by any other means any information it may currently have regarding such sites, despite the Staff's repeated requests for any information the Tribe may be willing to provide so that it may be captured as part of the Staff's NEPA and NHPA reviews and considered during the development of mitigation measures. Finally, the Oglala Sioux Tribe has not availed itself of the offered opportunities to survey the Dewey-Burdock project site for such properties.

Having no specific information on the presence of cultural, historic or religious sites of significance to the Oglala Sioux Tribe in the Dewey-Burdock area, it has not been possible for the Staff to supplement the FSEIS or the Record of Decision to describe such sites, identify adverse effects to them, or adopt measures to mitigate impacts to them beyond those already described in the FSEIS for sites within the area of potential effects of the project. The Staff's inability to obtain such information resulted not from inaction on its part, but from the Oglala Sioux Tribe having declined to participate in opportunities to survey the Dewey-Burdock site for its sites of cultural, historic or religious significance, or to otherwise provide to the Staff any

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<sup>208</sup> *Id.*; see also *supra* notes 73 & 123.

information it may have on such sites. Where, as here, it has not been reasonably possible to describe information because it cannot be obtained, the “hard look” standard is satisfied.

Notwithstanding the absence of specific information in the FSEIS concerning the cultural, historic or religious sites of significance to the Oglala Sioux Tribe, the Staff evaluated in its NEPA review information about Sioux cultural resources that it was able to obtain without the specific input of the Sioux Tribes. In Chapter 3 of the FSEIS, the Staff described various types of sites that could have been identified if the Sioux tribes provided field survey results.<sup>209</sup> The Staff described the cultural history of the Black Hills with reference to the Lakota Sioux’ connection to the area, including the religious and cultural significance of the Black Hills to the Lakota.<sup>210</sup> In addition, in the FSEIS, the Staff evaluated how the Dewey-Burdock project might affect *all* sites within the area of potential effects, not merely those sites that were eligible for listing on the National Register.<sup>211</sup> The Staff presented its impact determinations in the FSEIS, along with its recommended measures to mitigate these impacts.<sup>212</sup> After the Staff completed its evaluations, it provided its impact assessments and mitigation recommendations to all consulting tribes for comment – including the Oglala Sioux Tribe – as it had committed to doing when it released the Draft SEIS.<sup>213</sup>

In summary, the Staff has satisfied its obligation under NEPA to take a “hard look” at Sioux cultural resources that may be impacted by the Dewey-Burdock project. Accordingly, the Board should find that the Staff is entitled to judgment as a matter of law on Contention 1A.

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<sup>209</sup> Ex. NRC-008-A-1, FSEIS, at 257-63.

<sup>210</sup> *Id.* at 247, 257-59.

<sup>211</sup> Ex. NRC-008-A-2, FSEIS, at 466-86.

<sup>212</sup> *Id.* at 474-86. In particular, in Tables 4.9-4 through 4.9-6, the Staff provided its determinations regarding both environmental impacts and National Register eligibility. In these tables the Staff also included a column titled “Management Recommendation/Comments,” which lists its mitigation recommendations under both the NHPA and NEPA. *Id.*

<sup>213</sup> Exs. NRC-058 and NRC-061 through NRC-063.

CONCLUSION

The Board should grant the Staff's motion for summary disposition, resolve Contentions 1A and 1B in favor of the Staff, and terminate this proceeding.

Respectfully submitted,

*/Signed (electronically) by/  
Emily Monteith  
Emily Monteith  
Counsel for the NRC Staff*

*/Signed (electronically) by/  
David M. Cylkowski  
David M. Cylkowski  
Counsel for the NRC Staff*

Dated at Rockville, Maryland  
this 3rd day of August 2017

August 3, 2017

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|                                    |   |                        |
|------------------------------------|---|------------------------|
| In the Matter of                   | ) |                        |
|                                    | ) |                        |
| POWERTECH USA, INC.                | ) | Docket No. 40-9075-MLA |
|                                    | ) |                        |
| (Dewey-Burdock                     | ) |                        |
| In Situ Uranium Recovery Facility) | ) |                        |

NRC STAFF'S STATEMENT OF MATERIAL FACTS TO SUPPORT MOTION FOR  
SUMMARY DISPOSITION OF CONTENTIONS 1A AND 1B

In support of its motion for summary disposition on Contentions 1A and 1B, the Nuclear Regulatory Commission (NRC) Staff submits this statement of material facts for which there is no genuine issue to be heard. In its accompanying motion, the Staff explains why, based on these facts, the Atomic Safety and Licensing Board should grant summary disposition on Contentions 1A and 1B as a matter of law.

I. Pre-Hearing and Hearing History

1. On February 25, 2009, Powertech (USA) Inc. (Powertech) applied for an NRC source and byproduct materials license to be used in connection with its proposed Dewey-Burdock in-situ uranium recovery (ISR) facility in Custer and Fall River Counties, South Dakota. On August 10, 2009, Powertech submitted revisions to its application. On October 2, 2009, the NRC Staff notified Powertech that it found the revised application acceptable for detailed technical and environmental review.
2. As part of its application, Powertech submitted a Class III archaeological survey of the Dewey-Burdock site. A Class III archaeological survey involves a professionally conducted thorough pedestrian survey of an entire target area to identify properties that may be eligible for inclusion on the National Register of Historic Places.
3. On March 8, 2010, the Consolidated Intervenors requested a hearing on Powertech's application for an NRC license. On April 6, 2010, the Oglala Sioux Tribe requested a hearing.
4. On February 8, 2013, the Staff invited 23 Tribes, including the Oglala Sioux Tribe, to participate in field surveys of the Dewey-Burdock site in order to identify traditional

cultural properties (TCPs) of cultural, historic, or religious significance to them.<sup>1</sup> Between April 2 and May 3, 2013, the Staff facilitated these tribal field surveys. While the Oglala Sioux Tribe initially announced its intention to participate in a survey, the Oglala Sioux Tribe withdrew its acceptance because the Tribal Council would not be briefed before the survey was scheduled to begin.<sup>2</sup>

5. On January 31, 2014, the Staff issued the Final Supplemental Environmental Impact Statement for the Dewey-Burdock project.<sup>3</sup>
6. On April 7, 2014, the Staff finalized the Programmatic Agreement (PA) for the Dewey-Burdock project, which discusses, among other matters, the process that will be used to develop measures to mitigate impacts to historic or cultural resources that may be affected by the Dewey-Burdock project.<sup>4</sup> The signatories to the PA include the NRC, Powertech, the Bureau of Land Management, the South Dakota State Historic Preservation Office (SHPO), and the Advisory Council on Historic Preservation (ACHP).
7. On April 8, 2014, the Staff issued Source Material License No. SUA-1600 to Powertech.<sup>5</sup> The Staff also issued a Record of Decision documenting the Staff's decision to issue the license.<sup>6</sup>
8. Prior to the evidentiary hearing in this proceeding, the Atomic Safety and Licensing Board (Board) admitted two contentions, proffered by the Oglala Sioux Tribe, related to cultural resources. Contention 1A, as admitted and migrated by the Board, asserted that the FSEIS "fail[ed] to meet applicable legal requirements regarding protection of historical and cultural resources."<sup>7</sup> Contention 1B, as admitted and migrated by the Board, asserted that the Staff "failed to involve or consult all interested Tribes as required by federal law."<sup>8</sup>
9. From August 19-21, 2014, the Board held an evidentiary hearing in this proceeding in Rapid City, South Dakota.

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<sup>1</sup> Exhibit (Ex.) NRC-068, Email from Haimanot Yilma, Project Manager, Environmental Review Branch, to Tribal Historic Preservation Officers (Feb. 8, 2013) (ADAMS Accession No. ML13039A336).

<sup>2</sup> Ex. NRC-148, Letter from Bryan V. Brewer, President, Oglala Sioux Tribe, to Kevin Hsueh, Chief, Environmental Review Branch (Mar. 22, 2013) (ADAMS Accession No. ML13141A362).

<sup>3</sup> Exs. NRC-008-A-1 through NRC-008-B-2, NUREG-1910 Supp. 4, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Mining Facilities" (Jan. 31, 2014) (ADAMS Accession Nos. ML14024A477, ML14024A478).

<sup>4</sup> Exs. NRC-018-A through NRC-018-H, Final Programmatic Agreement for the Powertech (USA), Inc. Dewey-Burdock Project (Apr. 7, 2014) (ADAMS Accession Nos. ML14066A347, ML14066A350).

<sup>5</sup> Ex. NRC-012, NRC Source Material License No. SUA-1600 (ADAMS Accession No. ML14043A392).

<sup>6</sup> Ex. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project in Custer and Fall River Counties, South Dakota (Apr. 8, 2014) (ADAMS Accession No. ML14066A466).

<sup>7</sup> *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-14-5, 79 NRC 377, 401 (2014).

<sup>8</sup> *Id.*

10. On April 30, 2015, the Board issued a Partial Initial Decision resolving Contentions 1A and 1B in favor of the Oglala Sioux Tribe.<sup>9</sup> The Board ruled that the Staff could remedy the deficiencies identified by the Board “by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe which may be impacted by the Powertech Dewey-Burdock project, and to adopt measures to mitigate such adverse effects, if necessary.”<sup>10</sup> The Board retained jurisdiction of the case pending the Staff’s curing of these deficiencies and ordered the Staff to file monthly status reports describing its efforts to remedy the deficiencies, with the final report “includ[ing] an agreement reflecting the parties’ settlement of their dispute regarding the contentions or a motion for summary disposition of Contentions 1A and 1B.”<sup>11</sup>

## II. Planning and Conduct of Government-to-Government Meeting

11. On June 23, 2015, the Staff issued a letter to Mr. John Yellow Bird Steele, President of the Oglala Sioux Tribe, reiterating that the consultation process between the NRC and the Oglala Sioux Tribe is an ongoing effort. The letter stated that “the NRC Staff “renews its request for your views regarding any Sioux cultural, historical or religious sites that may be impacted by the Dewey-Burdock Project,” noting that “[y]our response will ensure that relevant information is properly captured in the PA and considered during the development of mitigation measures.”<sup>12</sup> The letter included “another invitation for the Oglala Sioux Tribe to meet with the NRC staff on a government-to-government basis.” The Staff identified the officials who would represent the NRC in a government-to-government meeting with the Tribe and requested the identity of the Oglala Sioux Tribe individuals viewed by the Tribe as the appropriate representatives for government-to-government consultation with the NRC.<sup>13</sup>
12. On July 22, 2015, the Staff received a letter from the Oglala Sioux Tribe responding to the Staff’s June 23, 2015 letter, “question[ing] whether the [Staff’s] letter provides a good faith attempt to remedy the problems identified” by the Board’s Partial Initial Decision and requesting that the NRC confirm “exactly what steps NRC Staff plans to take to meet its NEPA and NHPA duties as set out in the [Board’s] ruling.”<sup>14</sup> The Oglala Sioux Tribe further stated that the Staff’s letter had come at a time in which the Oglala Sioux Tribe is preparing for and conducting ceremonial Sun Dances, and that the Sun Dance ceremonial season lasts through the month of July. The Tribe stated that it “[did] not expect to be able to engage in this process until the Sun Dance ceremonial season has completed.”<sup>15</sup> The Tribe also requested clarification of “the roles, responsibilities, duties, and prior experience engaging in consultation under the NHPA, as well as past and

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<sup>9</sup> *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP 15-16, 81 NRC 618 (2015).

<sup>10</sup> *Id.* at 708.

<sup>11</sup> *Id.* at 710.

<sup>12</sup> Letter from Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John Yellow Bird Steele, President, Oglala Sioux Tribe (June 23, 2015) (ADAMS Accession No. ML15175A411).

<sup>13</sup> *Id.* at 2.

<sup>14</sup> Letter from Dennis Yellow Thunder, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (July 22, 2015) (ADAMS Accession No. ML15203A108) at 1.

<sup>15</sup> *Id.* at 2-3.

anticipated future involvement each of the NRC Staff's proposed officials with the proposed Dewey-Burdock project."<sup>16</sup>

13. On August 26, 2015, the Staff issued a letter responding to the Oglala Sioux Tribe's letter, clarifying that the Staff "intends to use any additional information it obtains from the Oglala Sioux Tribe to supplement both our NHPA and NEPA reviews." The Staff renewed its invitation to the Oglala Sioux Tribe to meet on a government-to-government basis in order to introduce the Staff's new management team and work toward remedying the deficiencies identified in the Board's Partial Initial Decision, and requested that the Oglala Sioux Tribe provide possible dates and locations for the meeting by September 18, 2015. The Staff also provided an organizational chart of the NRC's Office of Nuclear Material Safety and Safeguards (NMSS).<sup>17</sup>
14. On September 24, 2015, the Oglala Sioux Tribe issued a letter responding to the Staff's August 26, 2015 letter, stating its appreciation for the Staff's offer to help arrange a meeting to introduce the Staff's new management team and to work toward compliance with the Board's Partial Initial Decision. The Tribe stated its preference that such a meeting take place in the region of the proposed project, perhaps at Pine Ridge, and requested that the Staff provide a range of potential dates for such a meeting. The Tribe further stated that "any such meeting should accommodate not only time to discuss the relevant issues with representatives from the Oglala Sioux Tribe, but also with the other Sioux Tribes that have expressed similar concerns with the project . . . ."<sup>18</sup>
15. On September 29, 2015, the Staff responded to the Oglala Sioux Tribe's September 24, 2015 letter via email. The Staff agreed with the Oglala Sioux Tribe's suggestion to hold the meeting at the Pine Ridge Reservation, stated that it had no objection to the Oglala Sioux Tribe inviting other parties to the meeting, and requested that the Tribe share with the Staff potential dates in which the Oglala Sioux Tribe would be available for a meeting.<sup>19</sup>
16. On October 27, 2015, the Staff attempted to reach the Oglala Sioux Tribe THPO via phone. The Staff reached an Oglala Sioux Tribe representative who stated that the THPO, Mr. Dennis Yellow-Thunder, was away from the office for the week and that the Staff should contact him via email. The Staff verified with the Oglala Sioux Tribe representative that it had the correct email contact information for Mr. Yellow-Thunder.<sup>20</sup>

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<sup>16</sup> *Id.* at 2.

<sup>17</sup> Letter from Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Dennis Yellow Thunder, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Aug. 26, 2015) (ADAMS Accession No. ML15239B341).

<sup>18</sup> Letter from Dennis Yellow Thunder, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (Sept. 24, 2015) (ADAMS Accession No. ML15267A377).

<sup>19</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Dennis Yellow Thunder, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Sept. 29, 2015) (ADAMS Accession No. ML15273A145).

<sup>20</sup> Affidavit of Kellee L. Jamerson at ¶ 3.

17. On October 28, 2015, the Staff sent a follow-up email to the Oglala Sioux Tribe THPO. The Staff renewed its request for potential dates when the Oglala Sioux Tribe would be available for a government-to-government meeting.<sup>21</sup>
18. On October 30, 2015, the Staff issued a letter to Mr. John Yellow Bird Steele, President of the Oglala Sioux Tribe, informing him that the Staff had unsuccessfully attempted to reach the Oglala Sioux Tribe THPO via email and phone in order to coordinate the government-to-government meeting. The Staff “re-emphasize[d its] desire to meet and introduce the NRC team” and requested that the President’s staff contact the NRC Staff.<sup>22</sup>
19. On November 24, 2015, the Staff twice attempted to reach the Oglala Sioux Tribe THPO via phone. The Staff was unable to reach an Oglala Sioux Tribe representative or leave a voicemail message.<sup>23</sup>
20. On November 30, 2015, having received no reply to its emails, letter, or phone calls, the Staff contacted counsel for the Oglala Sioux Tribe via email to determine whether any changes in contact information were the reason for the lack of reply.<sup>24</sup>
21. On December 1, 2015, counsel for the Oglala Sioux Tribe responded to the Staff via email, stating that the Oglala Sioux Tribe THPO office was “very busy” and that he was not aware of the Staff providing any proposed dates for the government-to-government meeting.<sup>25</sup>
22. On December 17, 2015, the Staff issued a letter to Mr. John Yellow Bird Steele, President of the Oglala Sioux Tribe, stating that the Staff “recognizes the need to meet with the Oglala Sioux Tribe on a government-to-government basis.” The Staff stated that the purpose of such a meeting “would be to introduce the NRC management team responsible for this project and to work toward resolving the issues identified” in the Board’s Partial Initial Decision. The Staff proposed dates in February 2016 for the government-to-government meeting and holding the meeting in Pine Ridge, South Dakota. The Staff acknowledged the difficulty of coordinating a date for the meeting that

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<sup>21</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Dennis Yellow Thunder, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Oct. 28, 2015) (ADAMS Accession No. ML15302A292).

<sup>22</sup> Letter from Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John Yellow Bird Steele, President, Oglala Sioux Tribe (Oct. 30, 2015) (ADAMS Accession No. ML15302A316).

<sup>23</sup> Affidavit of Kellee L. Jamerson at ¶ 4.

<sup>24</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Jeffrey C. Parsons and Travis E. Stills, Counsel for the Oglala Sioux Tribe (Nov. 30, 2015) (ADAMS Accession No. ML15303A279).

<sup>25</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Dec. 1, 2015) (ADAMS Accession No. ML17209A078).

may be suitable for both parties and requested that the Tribe provide alternate dates if those presented were not convenient to the Tribe.<sup>26</sup>

23. Between February and April 2016, the Staff and the Oglala Sioux Tribe conferred to establish dates for a government-to-government meeting:
- A. On February 10, 2016, counsel for the Staff sent an email to counsel for the Oglala Sioux Tribe asking whether counsel for the Tribe could provide insight regarding the Tribe's status with respect to coordinating a government-to-government meeting with the Staff.<sup>27</sup>
  - B. On February 16, 2017, counsel for the Oglala Sioux Tribe responded via email, stating that he had requested the Tribe's THPO to provide dates when the Tribe would be available for a meeting as soon as possible, and that this information, once received, would be relayed immediately to the Staff.<sup>28</sup>
  - C. On March 3, 2016, counsel for the Oglala Sioux Tribe sent an email to counsel for the Staff identifying April 25, 26, or 27, 2016, as potential dates for the government-to-government meeting.<sup>29</sup>
  - D. On March 11, 2016, counsel for the Staff responded via email confirming that the Staff could support those dates.<sup>30</sup>
  - E. On March 22, 2016, having received no reply, counsel for the Staff sent a follow-up email asking whether the Oglala Sioux Tribe could confirm any of those dates for the meeting.<sup>31</sup>
  - F. On March 24, 2016, counsel for the Oglala Sioux Tribe responded via email stating that the Oglala Sioux Tribe THPO was undergoing "significant restructuring" and that the Oglala Sioux Tribe could not support the April 2016 dates, suggesting the week of May 16, 2016 as a potential date for the government-to-government meeting.<sup>32</sup>

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<sup>26</sup> Letter from Craig G. Erlanger, Acting Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John Yellow Bird Steele, President, Oglala Sioux Tribe (Dec. 17, 2015) (ADAMS Accession No. ML15348A185).

<sup>27</sup> Because the distribution of this email was limited to just the legal representatives of the parties, it was not included in the Staff's mandatory disclosures.

<sup>28</sup> See *supra* note 27.

<sup>29</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Christopher C. Hair, Counsel for the NRC Staff (Mar. 3, 2016) (ADAMS Accession No. ML16117A455 at 5).

<sup>30</sup> Email from Christopher C. Hair, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (Mar. 11, 2016) (ADAMS Accession No. ML16117A455 at 4-5).

<sup>31</sup> Email from Christopher C. Hair, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (Mar. 22, 2016) (ADAMS Accession No. ML16117A455 at 4).

<sup>32</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Christopher C. Hair, Counsel for the NRC Staff (Mar. 29, 2016) (ADAMS Accession No. ML16117A455 at 3-4).

- G. Counsel for the Staff responded via emails on March 31 and April 1, 2016, confirming the Staff's availability during the week of May 16, 2016.<sup>33</sup>
  - H. On April 18, 2016, having received no reply, counsel for the Staff sent a follow-up email requesting the status of the Oglala Sioux Tribe's availability during the week of May 16, 2016.<sup>34</sup>
  - I. On April 20, 2016, counsel for the Oglala Sioux Tribe responded via email that the Oglala Sioux Tribe was available on May 19, 2016, informing the Staff that Ms. Trina Lone Hill was instituted as the new Oglala Sioux Tribe THPO, and noting his suggestion to Ms. Lone Hill that "we may be able to conduct a meeting with only Oglala Sioux Tribe and NRC Staff representatives, followed by an opportunity to update other tribes that show interest."<sup>35</sup>
24. On May 19, 2016, the Staff and the Oglala Sioux Tribe held a government-to-government meeting in Pine Ridge, South Dakota.<sup>36</sup>
- A. The meeting's participants included a member of the Oglala Sioux Tribe's Executive Committee, the Oglala Sioux Tribe's THPO, the Staff's Director of the NMSS Division of Fuel Cycle Safety, Safeguards and Environmental Review, and the Staff's project managers responsible for oversight of the Dewey-Burdock project.<sup>37</sup>
  - B. The meeting "constituted the first step and building block for moving forward with the consultation process to gather information about historic and cultural resources of significance to the Oglala Sioux Tribe that could be affected by the construction and operation of the Dewey-Burdock [ISR] project . . . ."<sup>38</sup>
  - C. The Staff introduced themselves, explained the reorganization of NMSS, and provided updates on the status of the Dewey-Burdock ISR project.<sup>39</sup>
  - D. Among other matters, the Staff and the Tribe discussed the Tribe's objections to and concerns with the PA, the continued effectiveness of Powertech's license, and the tribal survey of the Dewey-Burdock site conducted in 2013.<sup>40</sup>

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<sup>33</sup> Email from Christopher C. Hair, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (Mar. 31, 2016) (ADAMS Accession No. ML16117A455 at 3); Email from Christopher C. Hair, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (Apr. 1, 2016) (ADAMS Accession No. ML16117A455 at 2-3).

<sup>34</sup> Email from Christopher C. Hair, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (Apr. 18, 2016) (ADAMS Accession No. ML16117A455 at 2).

<sup>35</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Christopher C. Hair, Counsel for the NRC Staff (Apr. 21, 2016) (ADAMS Accession No. ML16117A455 at 1-2).

<sup>36</sup> Summary of Meeting With the Oglala Sioux Tribe Regarding the Dewey-Burdock In Situ Uranium Recovery Project (May 19, 2016) (ADAMS Accession No. ML16182A069).

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1-2.

<sup>40</sup> *Id.*

- E. The Oglala Sioux Tribe stated that the tribal survey conducted in 2013 “was incomplete and the survey methodology lacked scientific integrity.” The Oglala Sioux Tribe asked that additional comprehensive and meaningful surveys be conducted and that other Tribes should also be involved.<sup>41</sup>
- F. The Staff “discussed the possibility of another survey opportunity,” clarifying that site access would need to be coordinated with the licensee.<sup>42</sup>
- G. The Oglala Sioux Tribe stated that “Tribal ordinances prohibit nuclear activities within Treaty lands and asked that these be taken into consideration, even if the project site is beyond the borders of the Tribe’s reservation,” and the Oglala Sioux Tribe THPO committed to provide to the Staff “specific citations to the ordinances regarding the prohibition of nuclear activities.” The Staff stated that it would consider these laws and ordinances as part of the consultation process.<sup>43</sup>

### III. Activities Leading to Teleconference with the Board

- 25. On August 16, 2016, the Staff sent an email to the Oglala Sioux Tribe THPO requesting the citations to the Tribal laws and ordinances referenced in the May 19, 2016 meeting. The Staff expressed a desire “to learn more about the Oglala Sioux Tribe’s thoughts/plans to conduct another survey.” The Staff noted again that a site survey would need to be coordinated with the licensee and requested that the THPO contact the Staff by phone for further discussion.<sup>44</sup>
- 26. On August 29, 2016, the Staff attempted to contact the Oglala Sioux Tribe THPO via phone to follow up on the August 16, 2016 email. The Staff was unable to reach an Oglala Sioux Tribe representative or leave a voicemail.<sup>45</sup>
- 27. On October 13, 2016, the Board issued a Memorandum and Order stating its intent to hold a teleconference to discuss the status of the ongoing consultation between the Staff and the Oglala Sioux Tribe.<sup>46</sup> On October 24, 2016, the Board issued an Order scheduling the teleconference for November 7, 2016.<sup>47</sup>
- 28. On November 7, 2016, the Board held a teleconference with the parties to discuss the status of the ongoing consultation between the Staff and the Oglala Sioux Tribe.

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<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2.

<sup>44</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Aug. 16, 2016) (ADAMS Accession No. ML16298A257).

<sup>45</sup> Affidavit of Kellee L. Jamerson at ¶ 5.

<sup>46</sup> Memorandum and Order (Requesting Scheduling Information for Telephone Conference Call) (Oct. 13, 2016) (ADAMS Accession No. ML16287A631).

<sup>47</sup> Order (Scheduling Telephonic Status Conference) (Oct. 24, 2016) (ADAMS Accession No. ML16298A331).

- A. Counsel for the Staff indicated that the Staff desired to hold a government-to-government meeting via teleconference with the Tribe to discuss the issues the Tribe raised in the May 19, 2016 meeting and to take further steps to effectuate a survey of the Dewey-Burdock site.<sup>48</sup> Counsel for the Staff noted that the Staff hoped to discuss the parameters of a site survey with the Tribe in such a teleconference.<sup>49</sup>
  - B. Counsel for the Staff stated that information on sites of cultural and historical importance to the Oglala Sioux Tribe can be obtained only from the Oglala Sioux Tribe itself.<sup>50</sup>
  - C. Counsel for the Staff stated: "We are willing to take any information that the Oglala Sioux Tribe is willing to provide on . . . historic and cultural resources of interest to them. Anything that they are willing to provide, we would be thrilled to have. . . . [T]he issue in this case is that we have not received anything . . . specific to the Oglala Sioux Tribe, and that's why we were not able to document it as a NEPA analysis, so any information would be of great value to us and would enable us to protect this through mitigation measures, through the programmatic agreement, et cetera."<sup>51</sup>
29. On November 23, 2016, the Staff issued a letter to the Oglala Sioux Tribe THPO inviting the Tribe to engage in further consultation on the parameters of an additional survey of the Dewey-Burdock site. The Staff proposed that a meeting should be held by teleconference in December 2016 or January 2017, or another timeframe suitable for the Tribe's schedule. The Staff also reiterated its willingness to consider as part of the consultation process the tribal laws and ordinances alluded to by the Tribe in the May 19, 2016 meeting. The Staff also responded to the Tribe's concerns regarding the continuing effectiveness of the license.<sup>52</sup>
30. On December 19, 2016, and again on December 21, 2016, the Staff, having received no response to its November 23, 2016 letter, attempted to reach the Oglala Sioux Tribe THPO via phone. The Staff was unable to reach the Oglala Sioux Tribe THPO and left a voicemail on each occasion.<sup>53</sup>
31. On December 22, 2016, the Staff sent an email to the Oglala Sioux Tribe THPO following up on the Staff's November 23, 2016 letter, reiterating its interest in participating in a teleconference to discuss an additional survey of the Dewey-Burdock

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<sup>48</sup> Transcript of November 7, 2016 Teleconference (ADAMS Accession No. ML16314A843) at 17, 21, 35-36, 56.

<sup>49</sup> *Id.* at 43.

<sup>50</sup> *Id.* at 25, 35.

<sup>51</sup> *Id.* at 45-46.

<sup>52</sup> Letter from Jill Caverly, Acting Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Nov. 23, 2016) (ADAMS Accession No. ML16327A549).

<sup>53</sup> Affidavit of Kellee L. Jamerson at ¶ 6.

ISR site and the Oglala Sioux Tribe's recommendations regarding the Dewey-Burdock PA.<sup>54</sup>

32. On January 13, 2017, counsel for the Oglala Sioux Tribe conveyed to the Staff a letter from the Oglala Sioux Tribe THPO suggesting dates for a conference call to continue the discussion of issues related to the proposed Dewey-Burdock.<sup>55</sup> In this letter, the Oglala Sioux Tribe THPO stated that, in addition to "government-to-government consultation between the Oglala Sioux Tribe and the United States," the Tribe "would like to discuss mechanisms to address issues concerning other parties with an interest in these issues in context of the NHPA/NEPA process" and "Powertech's stated unwillingness to meet its financial obligations for NRC Staff to complete its statutory mandates related to cultural resources" affected by the Dewey-Burdock project." The Oglala Sioux Tribe THPO further stated that in future discussions, "it is the Oglala Sioux Tribe's intent to seek to include cultural and historic preservation staff" from "several other Sioux tribes with cultural ties to the affected area."<sup>56</sup>
33. On January 18, 2017, the Staff sent an email to the Oglala Sioux Tribe THPO proposing several potential dates in January and early February 2017 for the teleconference and providing a list of topics for discussion, including a survey approach, methodology, parameters, participants, and report.<sup>57</sup> On January 25, 2017, counsel for the Oglala Sioux Tribe sent an email to the Staff offering January 31, 2017 as the date for the teleconference.<sup>58</sup> The Staff agreed to the date via email on January 26, 2017.<sup>59</sup>
34. On January 31, 2017, the Staff met with the Oglala Sioux Tribe THPO via teleconference:
  - A. The Staff expressed its commitment to working with the Oglala Sioux Tribe to conduct a survey of the Dewey-Burdock site in the near future. The Staff offered its "preliminary tribal survey approach," consisting of (1) an open site survey of the license area; (2) an opportunity to conduct the survey as early as April or May 2017; (3) per diem and mileage reimbursement for up to three Tribal representatives conducting the survey; and (4) an honorarium of \$10,000 paid to the Oglala Sioux Tribe. The Staff explained that it was offering an open site

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<sup>54</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Dec. 22, 2016) (ADAMS Accession No. ML16357A649).

<sup>55</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Jan. 13, 2017) (ADAMS Accession No. ML17017A506).

<sup>56</sup> Letter from Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Jill Caverly, Acting Chief, Environmental Review Branch (Jan. 13, 2017) (ADAMS Accession No. ML17017A505) at 1.

<sup>57</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Jan. 18, 2017) (ADAMS Accession No. ML17018A437).

<sup>58</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Jan. 25, 2017) (ADAMS Accession No. ML17030A356).

<sup>59</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Jan. 26, 2017) (ADAMS Accession No. ML17030A368).

survey because “the open site approach provides the flexibility of conducting a tribal survey using any survey methodology that the Tribe finds acceptable to identify cultural sites of importance to them.”<sup>60</sup>

- B. The Oglala Sioux Tribe stated that it was disappointed with the Staff’s proposal and that it was the same proposal rejected by the Oglala Sioux Tribe during the licensing review of the Dewey-Burdock ISR application. The Oglala Sioux Tribe stated that it would prefer a survey methodology similar in nature to the Makoche Wowapi proposal that was submitted in September 2012.<sup>61</sup>
- C. The Staff “asked the Tribe whether it would be willing to share information about known cultural and historic resources that may be impacted by the Dewey-Burdock project.”<sup>62</sup>
- D. The Staff expressed interest in receiving information from the Oglala Sioux Tribe’s on “the survey methodology/approach, number of tribal representatives to participate, cost/reimbursement, and timeframe.” The Oglala Sioux Tribe committed to provide the Staff information about a tribal survey approach by mid-March 2017 to aid the discussion and establishment of a survey.<sup>63</sup>
- E. The Staff and the Oglala Sioux Tribe agreed to hold another teleconference, tentatively scheduled for the beginning of April 2017, to continue consultation on a cultural resources survey.<sup>64</sup>

#### IV. Activities Following January 2017 Teleconference Meeting

- 35. On February 8, 2017, the Staff sent an email to the Oglala Sioux Tribe THPO with a draft summary of the January 31, 2017 teleconference. The Staff requested that the Oglala Sioux Tribe provide any comments on the draft summary by February 22, 2017.<sup>65</sup>
- 36. On February 23, 2017, having not received a reply from the Oglala Sioux Tribe, the Staff sent a follow-up email to the Oglala Sioux Tribe THPO and requested comments on the draft meeting summary by February 27, 2017. The Staff also requested that the Oglala Sioux Tribe provide its availability during the week of April 3, 2017, to support the next teleconference.<sup>66</sup>

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<sup>60</sup> Summary of Teleconference with the Oglala Sioux Tribe Regarding the Dewey-Burdock In Situ Uranium Recovery Project (Jan. 31, 2017) (ADAMS Accession No. ML17060A260) at 1.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Feb. 8, 2017) (ADAMS Accession No. ML17059D523).

<sup>66</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Feb. 23, 2017) (ADAMS Accession No. ML17060A280) at 2.

37. On February 27, 2017, counsel for the Oglala Sioux Tribe sent an email to the Staff stating that the Oglala Sioux Tribe expected to send edits on the draft meeting summary later that day, and that the Oglala Sioux Tribe was “in the process of pinning down dates in early April that work for another meeting.”<sup>67</sup> Counsel for the Oglala Sioux Tribe sent the edits on the meeting summary later that day.<sup>68</sup> On February 28, 2017, the Staff sent an email to the Oglala Sioux Tribe THPO stating that the meeting summary had been revised in response to the Oglala Sioux Tribe’s edits and that the Staff looked forward to hearing from the Oglala Sioux Tribe regarding its availability in early April for the next teleconference.<sup>69</sup>
38. On March 17, 2017, counsel for the Oglala Sioux Tribe sent an email to the Staff stating that the Oglala Sioux Tribe was “working on getting you all information on the Tribe’s concepts for a survey approach, as we committed – as well as a date in early April that works for another call,” and that the Tribe “will let you know as soon as possible.”<sup>70</sup> The Staff responded with an acknowledgement email the same day.<sup>71</sup>
39. On April 14, 2017, having not received information from the Oglala Sioux Tribe regarding survey parameters or its availability for another teleconference, the Staff issued a letter to the Oglala Sioux Tribe THPO offering specific arrangements for a survey of the Dewey-Burdock site and requesting the Oglala Sioux Tribe’s acceptance or rejection of the offer by May 5, 2017.<sup>72</sup>
40. On April 28, 2017, counsel for the Oglala Sioux Tribe sent an email to counsel for the Staff regarding the Staff’s April 14, 2017 letter:
  - A. Counsel for the Oglala Sioux Tribe stated that “Ms. Lone Hill is no longer Tribal Historic Preservation Officer of the Oglala Sioux Tribe,” and that “this change in the Tribe’s lead staff will necessarily result in some delay as new personnel are put in place and brought up to current.” Counsel for the Oglala Sioux Tribe stated that the Oglala Sioux Tribe would therefore not be able to respond to the Staff’s letter by May 5, 2017.<sup>73</sup>

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<sup>67</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Feb. 27, 2017) (ADAMS Accession No. ML17060A280) at 1-2.

<sup>68</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Feb. 27, 2017) (ADAMS Accession No. ML17060A280) at 1.

<sup>69</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Feb. 28, 2017) (ADAMS Accession No. ML17060A280) at 1.

<sup>70</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Mar. 17, 2017) (ADAMS Accession No. ML17086A142) at 1.

<sup>71</sup> Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Mar. 17, 2017) (ADAMS Accession No. ML17086A142) at 1.

<sup>72</sup> Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Apr. 14, 2017) (ADAMS Accession No. ML17103A500).

<sup>73</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Emily L. Monteith and David M. Cylkowski, Counsel for the NRC Staff (Apr. 28, 2017) (ADAMS Accession No. ML17118A259) at 1.

- B. Counsel for the Oglala Sioux Tribe stated that the Oglala Sioux Tribe's forthcoming response to the Staff's letter would "expand on the Tribe's stated position that key features of a survey should include a qualified contractor to coordinate a survey among the several interested Sioux Tribes based on accepted methodologies and professional standards to identify cultural, religious, and historic resources and the potential adverse effects to those resources."<sup>74</sup>
41. On May 8, 2017, counsel for the Staff sent an email to counsel for the Oglala Sioux Tribe explaining that following receipt of the April 28, 2017 email, the Staff had contacted the ACHP, South Dakota SHPO, and Oglala Sioux Tribe Natural Resources Regulatory Agency in an effort to identify the appropriate point of contact for the Oglala Sioux Tribe, and that it was the Staff's understanding that Ms. Lone Hill was again serving as the Oglala Sioux Tribe THPO after not holding the position for approximately one week. Counsel for the Staff informed counsel for the Oglala Sioux Tribe that the Staff planned to reissue the survey opportunity to the Oglala Sioux Tribe that day.<sup>75</sup>
42. Also on May 8, 2017, the Staff sent a letter to the Oglala Sioux Tribe THPO, copied to the President of the Oglala Sioux Tribe, reissuing the offer of arrangements for a survey of the Dewey-Burdock site and extending the available dates for a site survey to include August 2017. The Staff requested the Oglala Sioux Tribe provide its acceptance or rejection of the offer by May 19, 2017.<sup>76</sup>
43. On May 17, 2017, counsel for the Oglala Sioux Tribe sent an email to counsel for the Staff stating that his understanding was that "Ms. Lone Hill was out of the THPO position starting April 12 and only this week has had her office emails and phone systems re-established." Counsel for the Tribe further stated that because the Oglala Sioux Tribe's resources were currently committed to preparing comments on the Environmental Protection Agency's draft Underground Injection Control permits for the Dewey-Burdock project, the Oglala Sioux Tribe's response to the Staff's May 8, 2017 letter would be delayed until May 31, 2017.<sup>77</sup>
44. On May 22, 2017, counsel for the Staff sent an email to counsel for the Oglala Sioux Tribe acknowledging the May 17, 2017 email and stating that the Staff looked forward to hearing from the Oglala Sioux Tribe by May 31, 2017, regarding the Oglala Sioux Tribe's acceptance or rejection of the offered survey opportunity.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Email from David M. Cylkowski, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (May 8, 2017) (ADAMS Accession No. ML17144A221) at 1.

<sup>76</sup> Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (May 8, 2017) (ADAMS Accession No. ML17128A076).

<sup>77</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to David M. Cylkowski, Counsel for the NRC Staff (May 17, 2017) (ADAMS Accession No. ML17144A233) at 1.

<sup>78</sup> Email from Emily L. Monteith, Counsel for the NRC Staff, to Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe (May 22, 2017) (ADAMS Accession No. ML17144A240) at 1.

45. On May 31, 2017, counsel for the Oglala Sioux Tribe conveyed to the Staff via email a letter from the Oglala Sioux Tribe THPO to the Staff.<sup>79</sup> The letter articulated the following positions:
- A. The letter “seeks to make a positive contribution to the discussion initiated at the in-person meeting on May 19, 2016 at the Pine Ridge Reservation” and “outlines the basis for further discussions with the NRC Staff in carrying out the NRC’s statutory duties and government-to-government consultations.”<sup>80</sup>
  - B. For “the multiple reasons presented to NRC Staff on the record in the past, and reiterated in this letter,” the Staff’s “proposal remains unacceptable in its current form,” and the Oglala Sioux Tribe continues to object to an open site approach to any survey.<sup>81</sup>
  - C. The Staff must make “an effort to coordinate the several different Lakota Sioux Tribes before designing and conducting a cultural resources survey. . . . “[w]hile the Office understands that NRC Staff is under an obligation to conduct consultation meetings with the Oglala Sioux Tribe specifically, and the Office wishes to take part in those, coordination of a cultural resources survey must include the other Lakota Sioux tribal governments at the earliest stages in order to be competent in its analysis of Lakota Sioux cultural resources.”<sup>82</sup>
  - D. The letter stated that “the best manner to conduct a proper survey is to involve a contractor(s) with the necessary experience, training, and cultural knowledge to carry out and facilitate the survey.”<sup>83</sup>
  - E. The letter cited several excerpts of testimony in this and the Crow Butte License Renewal evidentiary hearings,<sup>84</sup> including the testimony of a former Oglala Sioux Tribe THPO, who testified that a TCP survey could take up to two years to complete: “So a TCP survey is quite extensive, and that’s why I didn’t want to limit to maybe even just one year. I would say a couple years. When you’re talking about that large of an audience, as far as that many tribes to be involved, to get a good feel for the area, maybe in different seasons – maybe they want to be out there when the ground visibility is the best, or maybe there are ceremonies to be performed during that time at the elders’ discretion.”<sup>85</sup>
  - F. “The methodologies, protocols, and timing need to account for the cultural needs of the Lakota Sioux – including the ability to use tribal elders and other experts as

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<sup>79</sup> Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch (May 31, 2017) (ADAMS Accession No. ML17152A112) at 1.

<sup>80</sup> Letter from Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch (May 31, 2017) (ADAMS Accession No. ML17152A109) at 1.

<sup>81</sup> *Id.* at 1-2.

<sup>82</sup> *Id.* at 3-4.

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Id.* at 3-9.

<sup>85</sup> *Id.* at 5-6 (quoting Transcript of Evidentiary Hearing in *Cameco Resources, Inc.* (Crow Butte License Renewal), Docket No. 40-8943-OLA, at 2275-76).

resources in a coordinated fashion with other tribal historic preservation offices,” and the Oglala Sioux Tribe “wishes to engage NRC Staff in a much more detailed discussion of how these components can be incorporated into a cultural resources survey approach.”<sup>86</sup>

- G. The letter requested “that significant further discussion take place on a face-to-face basis” and that the Staff travel to the Pine Ridge Reservation to discuss the letter, the Staff’s April 14, 2017 survey offer, and the PA.<sup>87</sup>
  - H. The letter requested that the Staff specifically confirm the identity of the NRC “decision maker for how the NHPA consultation process will be conducted.”<sup>88</sup>
46. On July 24, 2017, the Staff issued a letter to the Oglala Sioux Tribe THPO responding to the May 31, 2017 letter:
- A. The Staff explained the roles and responsibilities of the Staff personnel responsible for consultation activities<sup>89</sup> and enclosed an NMSS organizational chart.<sup>90</sup>
  - B. The Staff acknowledged that the Tribe considered the Staff’s offered site survey opportunity to be “unacceptable” and indicated that the Staff took this statement to convey the Tribe’s rejection of the offer.<sup>91</sup>
  - C. The Staff noted that in the teleconference meeting held on January 31, 2017, the Staff had presented the Tribe with a preliminary survey approach as a starting point for discussions regarding a mutually acceptable survey approach. The Staff stated that during the teleconference meeting, the Tribe had expressed its disappointment regarding the preliminary survey approach and committed to providing specific information concerning the Tribe’s desired parameters of a site survey by mid-March 2017 and to engage in further discussions with the Staff in the April 2017 timeframe concerning the Tribe’s proposal.
  - D. The Staff stated that throughout this period and thereafter, the Staff continued to seek this input from the Tribe, as well as information concerning the Tribe’s availability for further discussions regarding the parameters of a site survey.
  - E. The Staff explained that, the Tribe having not provided this information, the Staff issued the survey invitation in order to maintain communication with the Tribe

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<sup>86</sup> *Id.* at 8.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 9.

<sup>89</sup> Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (July 24, 2017) (ADAMS Accession No. ML17205A063) at 2.

<sup>90</sup> Organizational Chart of the Office of Nuclear Material Safety and Safeguards (May 31, 2017) (ADAMS Accession No. ML17205A067).

<sup>91</sup> Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Tribal Historic Preservation Officer, Oglala Sioux Tribe (July 24, 2017) (ADAMS Accession No. ML17205A063) at 1.

and to provide the Tribe with a broad window for selection of survey dates, taking into account the timeframes for the Sun Dance ceremonies and the onset of unfavorable weather.

- F. The Staff further stated that, in the absence of the specific input from the Tribe, it had offered the open site survey and honorarium to afford the Tribe the flexibility to select and use a survey methodology that it deemed acceptable for the identification of its own sites of cultural, historical, and religious significance.
- G. The Staff noted that the positions expressed in the May 31, 2017 letter regarding the length and methodology required for an adequate site survey and the requirement that the Staff coordinate with the governments of all Lakota Sioux Tribes before designing any survey “appear to be far apart from the discussions in the May 19, 2016, government-to-government meeting, the January 31, 2017, teleconference, and the reasonable opportunity to identify cultural resources described in the NRC staff’s letters dated April 14, 2017, and May 8, 2017.”<sup>92</sup>
- H. The Staff stated that in light of the positions expressed by the Oglala Sioux Tribe in the May 31, 2017 letter and the more than two years of consultation that have occurred since the Board’s Partial Initial Decision, the Staff “reluctantly recognizes that further consultation is unlikely to result in a mutually acceptable settlement of the dispute regarding the outstanding contentions.”<sup>93</sup>

Respectfully submitted,

*/Signed (electronically) by/  
Emily Monteith  
Emily Monteith  
Counsel for the NRC Staff*

*/Signed (electronically) by/  
David M. Cylkowski  
David M. Cylkowski  
Counsel for the NRC Staff*

Dated at Rockville, Maryland  
this 3rd day of August 2017

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<sup>92</sup> *Id.* at 2.

<sup>93</sup> *Id.*

August 3, 2017

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|                                    |   |                        |
|------------------------------------|---|------------------------|
| In the Matter of                   | ) |                        |
|                                    | ) |                        |
| POWERTECH USA, INC.                | ) | Docket No. 40-9075-MLA |
|                                    | ) |                        |
| (Dewey-Burdock                     | ) |                        |
| In Situ Uranium Recovery Facility) | ) |                        |

AFFIDAVIT OF KELLE L. JAMERSON CONCERNING THE NRC STAFF'S  
MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1A AND 1B

I, Kellee L. Jamerson, hereby state as follows:

1. I am an Environmental Scientist in the Nuclear Regulatory Commission's (NRC) Office of Nuclear Material Safety and Safeguards (NMSS), Division of Fuel Cycle Safety, Safeguards and Environmental Review (FCSE), Environmental Review Branch. I have served as Project Manager for the environmental review of the Dewey-Burdock in-situ uranium recovery facility since 2014. In that role, I have been responsible for consultation efforts between the NRC and the Oglala Sioux Tribe pursuant to the NRC's obligations under the National Historic Preservation Act and National Environmental Policy Act.

2. In this declaration, I present my recollection, to the best of my knowledge, information, and belief, of certain attempted or completed communications with representatives of the Oglala Sioux Tribe pursuant to the Staff's continued efforts to consult regarding the identification of sites of cultural, historic, or religious significance to the Oglala Sioux Tribe that may be present at the Dewey-Burdock site.

3. On September 29, 2015, I sent an email to Mr. Dennis Yellow Thunder, the Tribal Historic Preservation Officer (THPO) for the Oglala Sioux Tribe, as part of ongoing communications with the Oglala Sioux Tribe to coordinate a government-to-government

meeting. On October 27, 2015, having received no response to the September 29, 2015 email, I attempted to follow up with Mr. Yellow Thunder via phone. I reached an individual in the Oglala Sioux Tribe's Tribal Historic Preservation Office and informed her that I was attempting to follow up with Mr. Yellow Thunder. The individual stated that Mr. Yellow Thunder was away from the office for the week and advised that I attempt to follow up with him via email. I confirmed with the individual that I had Mr. Yellow Thunder's current and correct email address. I sent Mr. Yellow Thunder a follow-up email the next day, on October 28, 2015.

4. On October 30, 2015, Ms. Marissa Bailey, Director of FCSE, issued a letter to Mr. John Yellow Bird Steele, President of the Oglala Sioux Tribe, informing him that the Staff had unsuccessfully attempted to reach the Oglala Sioux Tribe THPO via email or phone in an effort to coordinate the government-to-government meeting. On November 24, 2015, with the understanding that the Staff had received no response to the recent emails or letter and no communication from the Oglala Sioux Tribe since September 24, 2015, I placed two phone calls to the Oglala Sioux Tribe THPO in an attempt to follow up. Both calls went unanswered, and I was not able to leave a voice message on either occasion.

5. On May 19, 2016, the Staff and the Oglala Sioux Tribe held a government-to-government meeting in Pine Ridge, South Dakota. On August 16, 2016, I sent an email to Ms. Trina Lone Hill, who was serving as THPO for the Oglala Sioux Tribe, to follow up on tribal ordinances that were discussed at the government-to-government meeting. On August 29, 2016, having received no response to the August 16, 2016 email, I attempted to contact the Oglala Sioux Tribe THPO via phone to follow up. The call went unanswered and I was not able to leave a voice message.

6. On November 23, 2016, Ms. Jill Caverly, Acting Chief of the Environmental Review Branch, issued a letter to Ms. Lone Hill with an invitation to participate in a teleconference to discuss the parameters of a potential survey of the Dewey-Burdock site for sites of cultural, historic, or religious significance to the Oglala Sioux Tribe. On December 19,

2016, with the understanding that the Staff had received no response to the November 23, 2016 letter, I placed a phone call to the Oglala Sioux Tribe THPO in an attempt to follow up. The phone call went unanswered and I left a voice message. On December 21, 2016, having received no response to the December 19, 2016 voice message, I placed another phone call to the Oglala Sioux Tribe THPO in an attempt to follow up. This phone call also went unanswered, and I left another voice message.

7. On January 31, 2017, the Staff and the Oglala Sioux Tribe THPO participated in a teleconference and discussed potential parameters for a survey of the Dewey-Burdock site. In that teleconference, the Oglala Sioux Tribe committed to provide its views on survey methodology, the number of Oglala Sioux Tribe representatives that would participate in a survey, cost and reimbursement factors, and the timeframe for a survey, as well as available dates for a follow-up teleconference in early April 2017, to the Staff by mid-March 2017. On March 17, 2017, Mr. Jeffrey Parsons, counsel for the Oglala Sioux Tribe, sent me an email stating that the Oglala Sioux Tribe was working on sending its views on survey parameters and available dates for a follow-up teleconference. By mid-April 2017, the Staff had yet to receive this information from the Oglala Sioux Tribe. Therefore, on April 14, 2017, Ms. Cinthya Román, Chief of the Environmental Review Branch, issued a letter inviting the Oglala Sioux Tribe to participate in a survey of the Dewey-Burdock site and outlining specific survey parameters. The Staff issued this letter at this time due to the length of time that had passed since the date by which the Oglala Sioux Tribe had committed to providing its views on survey parameters and dates for a follow-up teleconference and the limited timeframe remaining in 2017 in which to conduct a survey, due to the Oglala Sioux Tribe's unavailability during the Sun Dance ceremonies and the expected onset of winter weather. The Staff understood the survey parameters in the April 14, 2017 letter to provide a reasonable opportunity to identify sites of cultural, historic, and religious significance to the Oglala Sioux Tribe.

8. On May 31, 2017, Ms. Lone Hill issued a letter to Ms. Román in response to the offered survey opportunity. The letter stated that the offered survey opportunity was “unacceptable,” which I understood to be a rejection of the offer. The letter cited to testimony from the evidentiary hearing in the Crow Butte License Renewal adjudicatory proceeding, stating that a survey should take up to “a couple years” to complete. The letter also stated that the Staff must coordinate the governments of the several Lakota Sioux Tribes prior to designing any survey. I understood these positions to be far apart from the discussions in the May 19, 2016 government-to-government meeting, the January 31, 2017 teleconference, and the April 14, 2017 survey invitation. Based on this understanding, I did not and do not believe that the Staff and the Oglala Sioux Tribe are likely to reach consensus on acceptable survey parameters. On July 24, 2017, Ms. Román issued a letter to Ms. Lone Hill informing her that “further consultation is unlikely to result in a mutually acceptable settlement of the dispute regarding the outstanding contentions.”

9. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

  
Kellee L. Jamerson

Executed in Rockville, MD  
this 3rd day of August 2017

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|   |   |                               |
|---|---|-------------------------------|
| In the Matter of                        | ) |                               |
|   | ) |                               |
| POWERTECH (USA) INC                     | ) | Docket No. 40-9075-MLA        |
|   | ) | ASLBP No. 10-898-02- MLA-BD01 |
|   | ) |                               |
| (Dewey-Burdock In Situ Uranium Recovery | ) | Date: August 3, 2017          |
| Facility)                               | ) |                               |

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the "NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1A AND 1B" in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC's E-Filing System, this 3rd day of August, 2017. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its update by electronic mail, also on August 3, 2017.

***/Signed (electronically) by/  
Emily Monteith***

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Emily Monteith  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-14A44  
Washington, DC 20555-0001  
(301) 287-9119  
[Emily.Monteith@nrc.gov](mailto:Emily.Monteith@nrc.gov)